

# BEFORE THE HON'BLE SPEAKER

MAHARASHTRA LEGISLATIVE ASSEMBLY

VIDHAN BHAVAN AT MUMBAI

PETITION NO. 21 OF 2022

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SHRI. SUNIL PRABHU

PETITIONER

VERSUS

SHRI. EKNATH SHINDE & ORS

RESPONDENTS

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APPEARANCES:

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**For the Petitioner:** Sr. Adv. Devadatt Kamat, Adv. Rohit Sharma, Adv. Sunny Jain, Adv. Harsh Pandey for the Petitioner.

**For the Respondents:**

Sr. Adv. Mahesh Jethmalani, a/w Adv. Chirag Shah & Adv. Mugda Pande for Respondents 01, 03, 06, 07, 20, 27, 32, 36, & 39

Sr. Adv. Anil C. Singh i/by Adv. Manini Roy for Respondents 04, 10, 13, 22, 24, 29, 31 & 34

Sr. Adv. Pradeep Sancheti, a/w Adv. Utsav Trivedi & Adv. Arpit Gupta for Respondents 05, 11, 12, 14, 17, 18, 19, 23, 26 & 35

Sr. Adv. Anil Y. Sakhare, Adv. Piyush Tiwari, i/by Adv. Himanshu Sachdeva for Respondents 02, 08, 16, 21, 28 & 30

Adv. Harshad Bhadbhade i/by Adv. Vishal Acharya for Respondents 09, 33, & 37

Sr. Adv. Nikhil Sakardhande i/by Adv. Shyamsundar B. Jadhav for Respondents 15, 25 & 38

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<b>CORAM:</b>	Hon'ble Speaker Adv. Rahul Narvekar
<b>Reserved on:</b>	20 <sup>th</sup> December 2023
<b>Delivered on:</b>	10 <sup>th</sup> January 2024

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**(I) FACTUAL BACKGROUND & PROCEDURAL HISTORY OF DISQUALIFICATION PETITIONS CONCERNING SHIVSENA**

*Factual background*

1. The elections to the 14<sup>th</sup> Legislative Assembly of Maharashtra were held in October 2019. Of a total of two hundred and



eighty-eight seats, the Bharatiya Janata Party (*BJP for short*) returned candidates in one hundred and six seats, the Shiv Sena in fifty-six seats, the Nationalist Congress Party (*NCP for short*) in fifty-three seats, and the Indian National Congress (*INC for short*) in forty-four seats. Independent candidates were returned in thirteen constituencies and the remaining constituencies returned candidates from various other parties. In November 2019, the Shiv Sena, the NCP, and the INC formed a post-poll alliance which came to be known as the Maha Vikas Aghadi (*MVA for short*). The MVA successfully staked a claim to form the government in Maharashtra and Mr. Uddhav Thackeray was sworn in as the Chief Minister. On 25<sup>th</sup> November 2019<sup>1</sup>, pursuant to a meeting dated 30<sup>th</sup> October 2019 of the Shiv Sena Legislature Party (*SSLP for short*) chaired by Mr. Uddhav Thackeray, all fifty-six MLAs of the Shiv Sena issued a communication to the Speaker of the Maharashtra Legislative Assembly intimating him that Mr. Eknath Shinde was appointed as the Group Leader of the SSLP, and that Mr. Sunil Prabhu was appointed as the Chief Whip of the SSLP.

2. On 21<sup>st</sup> June 2022, the Chief Whip of the Shiv Sena, Mr. Sunil Prabhu, issued a whip<sup>2</sup> directing all MLAs of the Shiv Sena to

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<sup>1</sup> Communication dated 25<sup>th</sup> November 2019 caused by all 56 MLAs of the Shiv Sena to the Speaker of Maharashtra Legislative Assembly. [Page No. 710-714 of the SC Convenience Compilation Volume II.

<sup>2</sup> Copy of the Whip dated 21<sup>st</sup> June 2022 issued by Shri Sunil Prabhu [Annexure-P1 at Page 10 of the Petition No. 01-16 & 18 of 2022]



attend a meeting at Mr. Thackeray's residence on the same day. Many MLAs, including the Group Leader Mr. Eknath Shinde, (allegedly) did not attend this meeting<sup>3</sup>. The MLAs who were in attendance (allegedly) passed a resolution removing Mr. Eknath Shinde from the position of the Group Leader of the SSLP and appointing one Mr. Ajay Choudhari in his place<sup>4</sup>. The decisions taken by way of this resolution were communicated to the Deputy Speaker on the same day, i.e., 21<sup>st</sup> June 2022<sup>5</sup>. Also on the same day, the Deputy Speaker communicated his recognition of the change in the Group Leader of the SSLP<sup>6</sup>.

3. Concurrently, thirty-one MLAs of the Shiv Sena (i.e., the respondents) organized a separate meeting and passed a resolution reaffirming that Mr. Eknath Shinde "*continues to be*" the Group Leader of the SSLP<sup>7</sup>. It was further resolved that the appointment of Mr. Sunil Prabhu as the Chief Whip was cancelled, and that Mr. Bharat Gogawale was appointed in his place. Petitioner claims that this resolution was received by the Deputy Speaker only on 22<sup>nd</sup> June 2022 while the

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<sup>3</sup> Petitioner relied on the 'Attendance Register' dated 21<sup>st</sup> June 2022 [Annexure-P2 @ Page 11 of the Petition No. 01 to 16 of 2022]

<sup>4</sup> 'UBT faction' Resolution dated 21<sup>st</sup> June 2022 [Annexure-P3 @ Page 16 of the Petition No. 01 to 16 of 2022]

<sup>5</sup> 'UBT faction' Communication to the Speaker dated 21<sup>st</sup> June 2022. [Annexure-P4 @ Page 18 of the Petition No. 01 to 16 of 2022]

<sup>6</sup> Speaker' communication regarding recognition [Annexure-P5 @ Page 20 of the Petition No. 01 to 16 of 2022].

<sup>7</sup> 'Shinde faction' Resolution dated 21<sup>st</sup> June 2022. [Annexure-P9 @ Page 33 of the Petition No. 01 to 16 of 2022].



respondents claim that it was sent on 21<sup>st</sup> June 2022. The record available with the Legislature secretariate indicates that the resolution is dated 21<sup>st</sup> June 2022 but received by the office of the then Deputy Speaker on 22<sup>nd</sup> June 2022.

4. On 22<sup>nd</sup> June 2022, Mr. Sunil Prabhu issued individual communications to all MLAs of the Shiv Sena, calling upon them to attend a meeting of the SSLP scheduled to take place that evening at Mr. Thackeray's residence<sup>8</sup>. The meeting on 22<sup>nd</sup> June 2022, too, was not (allegedly) attended by many MLAs of the Shiv Sena including Mr. Eknath Shinde<sup>9</sup>.
5. Mr. Eknath Shinde addressed a letter<sup>10</sup> to Mr. Sunil Prabhu on 22<sup>nd</sup> June 2022 accusing him of misusing the letterhead of the SSLP. The letter stated that:
  - (a) A meeting of forty-five MLAs of the Shiv Sena was held under the chairmanship of Mr. Eknath Shinde;
  - (b) Mr. Sunil Prabhu was removed from the position of Chief Whip of the Shiv Sena;
  - (c) Mr. Bharat Gogawale was appointed as the Chief Whip of the Shiv Sena in place of Mr. Sunil Prabhu; and

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<sup>8</sup> Letter dated 22<sup>nd</sup> June 2022. [Annexure-P10 @ Page 41 of the Petition No. 01 to 16 of 2022]

<sup>9</sup> Petitioner relied on the 'Attendance Register' dated 22<sup>nd</sup> June 2022 [Annexure-P7 @ Page 25 of the Petition No. 01 to 16 of 2022]

<sup>10</sup> Copy of the Communication dated 22<sup>nd</sup> June 2022 sent by the Respondents. [Annexure-P10 @ Page 41 of the Petition No. 01 to 16 of 2022]



(d) Mr. Sunil Prabhu did not have the authority to sign the communication dated 22<sup>nd</sup> June 2022 (issued by him to all MLAs of the Shiv Sena). It was therefore not binding upon Mr. Eknath Shinde to attend the meeting scheduled to take place at Mr. Thackeray's residence.

6. On 23<sup>rd</sup> June 2022, Mr. Sunil Prabhu filed petitions under Paragraph 2(1)(a) of the Tenth Schedule to the Constitution for the disqualification of Mr. Eknath Shinde and fifteen other MLAs of the Shiv Sena. The Deputy Speaker issued notices in these disqualification petitions on 25<sup>th</sup> June 2022. [Disqualification Petitions No. 01 to 16 of 2022]
7. On 26<sup>th</sup> June 2022 Respondents approached the Hon'ble Supreme Court of India *inter-alia* challenging the letter/order dated 21<sup>st</sup> June 2022 passed by the then Deputy Speaker accepting appointment of Shri. Ajay Choudhari as the Leader of the Shiv Sena Legislature Party and prayed for consequential concomitant reliefs.<sup>11</sup>
8. On 27<sup>th</sup> June 2022 Shri. Sunil Prabhu filed another Disqualification Petition [Disqualification Petition No. 17 of 2022], under Paragraph 2 (2) and 2 (1) (a) of the Tenth Schedule of the Constitution of India against 3 MLAs. 2 Independent MLAs and 1 MLA from Prahar Janshakti Party.



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<sup>11</sup> Writ Petition (Civil) 468 and 469 of 2022 filed before the Supreme Court of India.



On the same day, i.e., on 27<sup>th</sup> June 2022, Shri. Sunil Prabhu filed yet another Disqualification Petition [Disqualification Petition No. 18 of 2022] under Paragraph 2 (1) (a) of the Tenth Schedule of the Constitution of India, against 22 MLAs of Shiv Sena.

9. On 28<sup>th</sup> June 2022, the then Leader of Opposition Mr. Devendra Fadnavis addressed a letter to the Governor *inter alia* conveying that he believed that the then Chief Minister, Mr. Thackeray, did not enjoy a majority on the floor of the House. He called upon the Governor to direct Mr. Thackeray to prove his majority on the floor of the House. Seven MLAs who were elected as independent candidates penned a similar letter to the Governor on the same day. They too requested the Governor to direct Mr. Thackeray to prove his majority on the floor of the House.

10. Consequently, the Hon'ble Governor of Maharashtra issued a letter to the then Chief Minister, Mr. Uddhav Thackeray on 28<sup>th</sup> June 2022, calling upon him to face a floor test on 30<sup>th</sup> June 2022.

11. On the very next day, i.e., 29<sup>th</sup> June 2022, Mr. Sunil Prabhu instituted a Writ Petition<sup>12</sup> before the Hon'ble Supreme Court of India for setting aside the communications dated 28<sup>th</sup> June



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<sup>12</sup> Writ Petition (Civil) No. 470 of 2022 filed before the Hon'ble Supreme Court of India.

2022 issued by the Hon'ble Governor to the then Chief Minister on the ground that disqualification petitions against thirty-eight MLAs of the Shiv Sena were pending consideration before the Deputy Speaker. The Hon'ble Supreme Court declined to grant any stay to the trust vote.

12. On 29<sup>th</sup> June 2022 the then Chief Minister Shri. Uddhav Thackeray resigned from the post of the Chief Minister.

13. On 30<sup>th</sup> June 2022, Mr. Shinde submitted a letter to the Governor along with a resolution by thirty-nine MLAs from the SSLP unanimously resolving to authorise Mr. Shinde to initiate proceedings to form the government in the State. In the said letter, Mr. Shinde claimed the support of one hundred and six BJP MLAs and seventeen independent and other MLAs. Moreover, Mr. Shinde claimed that he had the support of the majority and requested the Governor to invite him to take oath as the Chief Minister. On 30<sup>th</sup> June 2022, sixteen MLAs who were independent candidates or belonged to parties other than the Shiv Sena, BJP, INC, and NCP wrote to the Governor expressing their support for a government led by Mr. Shinde. On the same day, the Governor issued a communication to Mr. Shinde inviting him to take oath as the Chief Minister and directing him to prove that he enjoyed the confidence of the Assembly within a period of seven days of taking over as the Chief Minister.



14. Consequently, on 30<sup>th</sup> June 2022, the Governor administered the oath of office to Mr. Shinde and Mr. Fadnavis, and they assumed the roles of Chief Minister and Deputy Chief Minister of Maharashtra, respectively. On the same day, Mr. Thackeray issued a letter to Mr. Shinde stating that he had been removed from the post of 'Shiv Sena Leader' in the organisational structure of the party. Mr. Thackeray similarly (purportedly) removed other MLAs of the Shiv Sena from their roles as office-bearers of the party.

15. Later that week, the Principal Secretary of the Maharashtra Legislature Secretariat circulated the 'Order of the day' for the session which was scheduled to take place on 3<sup>rd</sup> July 2022<sup>13</sup>. The fifth item on the agenda was the election for the post of the Speaker. I, Rahul Narvekar, was nominated for this position while an MLA of the NCP nominated Mr. Rajan Salvi. Further, a motion of confidence for the '*Council of Ministers*' headed by the Chief Minister, Mr. Shinde, was scheduled to be moved in a session of the Assembly on 4<sup>th</sup> July 2022.

16. On 02<sup>nd</sup> July 2022, Shri. Sunil Prabhu (allegedly) issued two whips. The first whip directed all MLAs of the Shiv Sena to attend the session of the Maharashtra Legislative Assembly on 4<sup>th</sup> July 2022 and vote against the motion of confidence for the



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<sup>13</sup> 'Order of the day' dated 03<sup>rd</sup> July 2023.

Council of Ministers headed by the Chief Minister, Mr. Shinde. The second whip directed all MLAs of the Shiv Sena to attend the session of the Maharashtra Legislative Assembly on 3<sup>rd</sup> July 2022 and vote for Shri. Rajan Salvi, in the election for the post of the Speaker.

17. On 3<sup>rd</sup> July 2022, I proceeded to recognise Mr. Eknath Shinde as the Leader of the SSLP in place of Shri Ajay Choudhari and Shri. Bharat Gogawale as the Chief Whip of the Shiv Sena in place of Mr. Sunil Prabhu. These decisions were recorded in a communication dated 03<sup>rd</sup> July 2022 issued by the Deputy Secretary of the Maharashtra Legislature Secretariat. I may mention here that the Hon'ble Supreme Court was pleased to quash this decision and direct to take a fresh decision after an inquiry into whether the resolutions, based on which the recognition was accorded, reflected the will of the Shiv Sena Political Party.<sup>14</sup>

18. On 04<sup>th</sup> July 2022, Shri. Sunil Prabhu filed a fresh Disqualification Petition [Disqualification Petition No. 19 of 2022], under Paragraph 2 (1) (b) of the Tenth Schedule of the Constitution of India, against Shri. Eknath Shinde and 38 other MLAs of Shiv Sena for alleged violation of Whip dated 02<sup>nd</sup> July 2022 regarding the Election of Speaker.



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<sup>14</sup> Writ Petition (Civil) No. 479 of 2022.

19. On 05<sup>th</sup> July 2022, Shri. Bharat Gogawale filed 14 Disqualification Petitions [Disqualification Petitions No. 20 and 22 to 34 of 2022], under Paragraph 2 (1) (a) & 2 (1) (b) of the Tenth Schedule of the Constitution of India, against Shri. Sunil Prabhu and 13 other MLAs of Shiv Sena for alleged violation of Whip dated 03<sup>rd</sup> July 2023 regarding the Motion of Confidence in Council of Ministers.

20. On 06<sup>th</sup> July 2022, Shri. Sunil Prabhu filed another Disqualification Petition [Disqualification Petition No. 21 of 2022], under Paragraph 2 (1) (a) & 2 (1) (b) of the Tenth Schedule of the Constitution, against Shri. Eknath Shinde and 38 other MLAs of Shiv Sena for alleged violation of Whip dated 02<sup>nd</sup> July 2023 regarding the Motion of Confidence in Council of Ministers.

21. On 08<sup>th</sup> July 2022, the Petitioner, *vide* Writ Petition (Civil) No. 538 of 2022, sought quashing of Notices issued in pursuance of the Disqualification Petitions filed by Shri. Bharat Gogawale before the Hon'ble Supreme Court of India.<sup>15</sup>

22. On 12<sup>th</sup> July 2022, a Letter came to be received from the Advocate on Record of Shri. Sunil Prabhu intimating the Oral direction of the Hon'ble Supreme Court of India to defer hearings in Disqualification Petitions till the final hearing and



<sup>15</sup> Writ Petition (Civil) No. 538 of 2022.

judgment in Writ Petition (Civil) No. 493 of 2022 and other connected petitions, which were referred to a Constitution Bench of the Apex Court.

23. Hon'ble Supreme Court was pleased to club all the Petitions filed by both the factions of Shiv Sena and refer them to a Constitution Bench of the Hon'ble Supreme Court. On 23<sup>rd</sup> August 2022 the Hon'ble Supreme Court framed nine issues for consideration by the Constitution Bench of the Apex Court. Subsequently, the Constitution Bench of the Hon'ble Supreme Court of India passed its Judgment dated 11<sup>th</sup> May 2023 in Writ Petition (Civil) No. 493 of 2022 and other connected petitions [Subash Desai Vs. Governor of Maharashtra, 2023 SCC Online SC 607]<sup>16</sup>.

24. By the aforementioned judgement dated 11<sup>th</sup> May 2023 the Hon'ble Supreme Court was pleased to conclude that the Apex Court cannot ordinarily adjudicate petitions for disqualification under the Tenth Schedule in the first instance and there are no extraordinary circumstances which warranted the exercise of jurisdiction of the Apex Court to adjudicate the Disqualification Petitions concerning Shiv Sena. Consequently, the Hon'ble Apex Court relegated the parties to their remedies under the Tenth Schedule of the Constitution



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<sup>16</sup> Subash Desai Vs. Governor of Maharashtra, 2023 SCC Online SC 607

and directed this Forum to decide the aforementioned disqualification petitions.

### *Procedural history*

25. On 07<sup>th</sup> June 2023, as per my directions, the Secretary (1) (I/C) sought certified copies of the Constitution of Shiv Sena from the Election Commission of India. On 26<sup>th</sup> June 2023 Election Commission of India replied to the said Letter thereby providing a copy of the Constitution of Shiv Sena as was submitted to the Election Commission of India and a copy of the Judgment dated 17<sup>th</sup> February 2023 passed by the Election Commission in Dispute Case No. 01 of 2022.
26. Consequent to the judgment dated 11<sup>th</sup> May 2023 passed by the Hon'ble Supreme Court in *Subash Desai (Supra)*, Notices were re-issued in all Disqualification Petitions, except for Petition No. 17 of 2022, on 07<sup>th</sup> July 2023, thereby directing to file replies within 7 days from the date of receipt of the Notice.
27. On 16<sup>th</sup> July 2023 a Letter came to be received from Respondents in Disqualification Petitions 01 to 16, 17, 18, 19 and 21 of 2022 seeking extension of time to file Replies in Disqualification Petitions.
28. On 17<sup>th</sup> July 2023 Monsoon session of the Maharashtra Assembly commenced.



29. On 18<sup>th</sup> July 2023 Replies from Respondents [Shiv Sena (UBT) faction] in Disqualification Petitions No. 20 & 22 to 34 of 2022 came to be filed.
30. On 24<sup>th</sup> July 2023, Respondents' [in Disqualification Petitions 01 to 16, 17, 18, 19 and 21 of 2022] request for extension of time to file replies were granted and Respondents were directed to file replies within two weeks immediately after the proroguing of 2023 Monsoon Session of the Assembly.
31. On 27<sup>th</sup> July 2023, Notices were issued in Disqualification Petition No. 17 of 2022, thereby directing to file reply within 7 days from the date of receipt of the Notice.
32. On 04<sup>th</sup> August 2023, Monsoon session of the Maharashtra Assembly of the year 2023 ended.
33. On 17<sup>th</sup> August 2023 Respondents filed their replies to Disqualification Petitions No. 01 to 16, 18, 19 & 21 of 2022.
34. On 18<sup>th</sup> August 2023 replies from Respondents No. 01 and 02 in Petition No. 17 of 2022 came to be filed.
35. On 05<sup>th</sup> September 2023 Respondent No. 03 in Petition No. 17 of 2022 filed his reply.





36. On 06<sup>th</sup> September 2023 Notices were issued in Disqualification Petitions intimating the preliminary hearing scheduled on 14<sup>th</sup> September 2023.
37. On the first date of hearing, i.e., on 14<sup>th</sup> September 2023, Parties were directed to complete service of Petitions/Replies. On the said date, Shri. Sunil Prabhu [Petitioner in Disqualification Petitions 01 to 16, 17, 18, 19 and 21 of 2022] filed an application seeking consolidation of all 34 Petitions.
38. On 18<sup>th</sup> September 2023, Shri. Sunil Prabhu [Petitioner in Disqualification Petitions 01 to 16, 17, 18, 19 and 21 of 2022] filed an Application seeking permission to place on record additional documents.
39. On 18<sup>th</sup> September 2023 the Hon'ble Supreme Court directed the disqualification petitions to be listed within a period of one week to set out procedural directions and time schedule for hearing of petitions. Accordingly, all petitions were listed on 25<sup>th</sup> September 2023 and time schedule was set out.
40. On 25<sup>th</sup> September 2023, Shri Sunil Prabhu [Petitioner in Disqualification Petitions 01 to 16, 17, 18, 19 and 21 of 2022] sought to bring on record an Additional Affidavit to bring on record subsequent events. Respondents objected to the same being taken on record without hearing them.



41. On 12<sup>th</sup> October 2023, parties were heard on Petitioner's [Shri. Sunil Prabhu] two Applications [Application to consolidate all petitions and Application seeking liberty to place additional documents on record] and the Additional Affidavit to bring on record additional facts. The orders in the said Applications were reserved and petitions were adjourned to 20<sup>th</sup> October 2023.

42. On 17<sup>th</sup> October 2023, the Hon'ble Supreme Court indicated that it is not satisfied with the schedule set out on 25<sup>th</sup> September 2023 and directed to prescribe a fresh time schedule for hearing and disposal of disqualification petitions.

43. On 20<sup>th</sup> October 2023, Orders were passed in (i) Petitioner's (Shri. Sunil Prabhu) Application seeking consolidation of all Petitions, (ii) Petitioner's (Shri. Sunil Prabhu) Application seeking permission to produce additional documents on record and (iii) Petitioner's (Shri. Sunil Prabhu) Additional Affidavit seeking additional facts to be brought on record.

44. Disqualification Petitions (34 Petitions) were grouped into 6 groups according to causes of actions. Since, Petitioner's Application for bringing additional documents was partially allowed and Petitioner's Additional Affidavit to bring on record additional facts were allowed to be taken on record,



Respondents in disqualification petitions were given time till 25<sup>th</sup> October 2023 to file Additional Reply. On the said date of hearing, Petitioner filed yet another Application for Discovery and/or Production. Certain Respondents also filed Applications seeking permission to lead evidence by way of affidavit. Parties were directed to file replies in respective Applications and both the Applications were kept for arguments on 26<sup>th</sup> October 2023 along with hearing on draft issues directed to be submitted by 25<sup>th</sup> October 2023.

45. On 25<sup>th</sup> October 2023, Respondents filed Additional replies. Petitioner filed replies to Respondent's Application and Respondents filed replies to Petitioner's Application.
46. On 26<sup>th</sup> October 2023, the hearing commenced at 4 PM and heard both the sides till almost 8:30 PM on the Applications filed on 20<sup>th</sup> October 2023. However, arguments could not be concluded. Hence, the matter was adjourned to 2<sup>nd</sup> November 2023, by consent of both parties, for resuming arguments on Applications filed on 20<sup>th</sup> October 2023 and to settle issues.
47. On 30<sup>th</sup> October 2023, the Hon'ble Supreme Court was pleased to direct that all hearings should be concluded, and final orders passed in all disqualification petitions concerning Shiv Sena, on or before 31<sup>st</sup> December 2023.



48. On 02.11.2023 Disqualification Petitions were listed for hearing on (i) application dated 20<sup>th</sup> October 2023 filed by the Respondent in Disqualification Petition No. 7 of 2022 and (ii) for framing of issues. Even though the Petitioner initially took a stand that parties need not lead evidence in disqualifications petitions, however, during the course of hearing on said application, the counsel for the Petitioner submitted that the Petitioner would also like to lead evidence in the matter. Thus, by consent of both the parties, the application dated 20<sup>th</sup> October 2023 was disposed of by giving opportunity, to both the Petitioner and the Respondents, to lead evidence in all the Disqualification Petitions. Further, issues were framed after hearing both the parties.

49. Further, the convenience compilations filed before the Hon'ble Apex Court in Writ Petition (Civil) No. 468, 469, 470, 479, 493 and 538 of 2022 were taken on record of all the Disqualification Petitions and as per the directions of this Hon'ble Apex Court, parties were granted time till 6<sup>th</sup> November 2023 to exchange and file their respective statement of admission and denial. Further, parties were directed to file and exchange list of witnesses and Affidavit/s in lieu of Examination in Chief on or before 18<sup>th</sup> November 2023. Consequently, Disqualification Petitions No. 1 to 34 were directed to be listed on 21<sup>st</sup> November 2023 for



commencement of cross examinations of Petitioner's witnesses.

50. On 06<sup>th</sup> November 2023 parties filed Statement of Admission and Denial.

51. On 18<sup>th</sup> November 2023 Petitioner filed list of witnesses and Affidavits in lieu of Chief Examinations.

52. On 21<sup>st</sup> November 2023, Cross examinations of Petitioner's witnesses commenced. On the said date, the hearing commenced at around 10:30 AM and went on till 05:00 PM with a 1 (one) hour recess in between. Cross examination of Petitioners' witnesses continued on a day-to-day basis till 23<sup>rd</sup> November 2023 with the same time schedule. The petitions were not listed on 24<sup>th</sup> November 2023 owing to the request received from the Petitioner Shri Sunil Prabhu citing medical reasons.

53. On 28<sup>th</sup> November 2023, Petitions were listed for continuation of cross examination of Petitioner's witnesses on 28<sup>th</sup> November 2023 with the same time schedule and it continued on a day-to-day basis.

54. The questions were being asked in English. The PW-1 (Mr. Sunil Prabhu) had requested translation of the same to Marathi. The same was provided. His answers were recorded



in Marathi and on the request of parties the said Marathi answer was translated immediately to English and incorporated below the answer in Marathi.

55. Cross Examinations of Petitioner's witnesses were supposed to be concluded on 1<sup>st</sup> December 2023. However, it could not be done due to an application filed by the Petitioner Shri Sunil Prabhu on 1<sup>st</sup> December 2023 and submissions advanced by both the sides on the said application. Hence, Petitions were further directed to be listed on 2<sup>nd</sup> December 2023 for continuation and conclusion of cross examination of Petitioner's witnesses.

56. On 2<sup>nd</sup> December 2023, Petitioner's evidence was closed and by consent of both the Parties, Petitions were directed to be listed on 7<sup>th</sup> December 2023 for commencement of Respondents' witnesses' cross examinations.

57. The Petitions were not listed on 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and/or 6<sup>th</sup> December 2023 owing to the need of shifting the record and proceedings to Nagpur, Maharashtra where the Winter Session of the Maharashtra Legislative Assembly is held. Hence, on 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> December 2023, the Legislature Secretariat moved the record and proceedings from Mumbai to Nagpur and made necessary arrangements at the Vidhan Bhavan, Nagpur for continuation of the hearing.



58. On the first day of hearing at Nagpur i.e., on 7<sup>th</sup> December 2023, the Disqualification Petitions were heard from 2:30 PM till 8:00 PM. On 8<sup>th</sup> December 2023, the first session of the hearing commenced at 8:30 AM and continued till 10:45 AM. The second session on that day started at 2:30 PM and continued till 7:00 PM. On 9<sup>th</sup> December 2023, the hearing commenced at 8:30 AM and continued till 12:00 PM. It needs to be stated at this juncture that, the Petitions could not be listed on the second session of 9<sup>th</sup> December and on 10<sup>th</sup> December 2023 owing to the request made by the Petitioner seeking time to prepare for cross examination in view of an additional chief examination advanced by the RW-3. Hence, the Petitions were adjourned to 11<sup>th</sup> December 2023 for continuation of Respondents' witnesses' cross examination.

59. Disqualification Petitions No. 1 to 34 were listed for continuation of cross examination of Respondents' witnesses. It was conducted from 8:30 AM till 10:45 AM and thereafter from 2:30 PM till 7:15 PM.

60. On 12<sup>th</sup> December 2023, Cross Examinations of Respondents' witnesses stood concluded, and Respondents' evidence closed. On 12<sup>th</sup> December 2023, Respondents' witnesses' cross examinations started in the morning at 08:30 AM and



continued till 10:45 AM and the second session started at around 01:45 PM and continued till 08:30 PM.

61. Consequent to the conclusion of evidence, Parties sought a period of 2-3 days between the date of conclusion of cross examinations/evidence, and the commencement of final hearing so as to prepare “written notes of arguments and convenience compilations.” Thus, the final hearing of Petitions was kept on 18<sup>th</sup> December 2023.

62. Final hearing of all 34 petitions commenced on 18<sup>th</sup> December 2023 and concluded on 20<sup>th</sup> December 2023. Thus, on 20<sup>th</sup> December 2023, hearing was concluded, and Petitions were reserved for final orders.

## **(II) SUMMARY OF THE PARTIES’ RESPECTIVE CASES AND RELIEFS SOUGHT**

63. Disqualification Petitions No 21 of 2022 has been filed by the Petitioner, Shri. Sunil Prabhu, against Shri. Eknath Shinde and 38 other members of 14<sup>th</sup> Maharashtra Legislative Assembly under Paragraph 2 (1) (b) of the Tenth Schedule of the Constitution *inter-alia* on the following grounds<sup>17</sup>:

- (a) The Petitioner had issued a Whip on 02<sup>nd</sup> July 2022 thereby directing the MLAs of SSLP to vote against the



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<sup>17</sup> Paragraph 04 of the Disqualification Petition No. 19 of 2022



Vote of Confidence on the *Council of Ministers* held on 04<sup>th</sup> July 2022.

- (b) The Respondents in utter violation to the Whip dated 02<sup>nd</sup> July 2022 have voted in favour of the cabinet of the State of Maharashtra in the floor test/confidence motions held on 04<sup>th</sup> July 2022 against the will and instructions of the party and such an act of cross voting is in teeth of Paragraph 2 (1) (b) of the Tenth Schedule.
- (c) The Respondents have voted contrary to the directions issued by the Party to which they belong without obtaining prior permission of the party and such voting has not been condoned by the party. The said action of the Respondents, in voting contrary to directions issued by the party, attracts consequences under Paragraph 2 (1) (b) of the Tenth Schedule.

64. Leading up to the aforementioned grounds Petitioner pleaded the following facts:

- (a) A special two-day Assembly Session was convened on 03<sup>rd</sup> July 2022 and 04<sup>th</sup> July 2022 with an agenda for the Election of the Speaker and for a vote of confidence in the council of ministers.



- (b) On 2<sup>nd</sup> July 2022, the Petitioner issued two Whips directing the MLAs of SSLP to vote in favour of Shri Rajana Prabhakar Salvi in the election of Speaker and to vote against the vote of confidence in the cabinet of the State of Maharashtra.
- (c) The election for the Speaker was held on 03<sup>rd</sup> July 2022 and the candidate set up by the BJP was elected as the Speaker. On 03<sup>rd</sup> July 2022 Disqualification proceedings were initiated under the provisions of Paragraph 2 (1) (b) of the Tenth Schedule of the Constitution for cross voting during the election of the Speaker.
- (d) The action of the Respondents, in voting contrary to directions issued by the party, attracts the contents of Paragraph 2 (1) (b) of the Tenth Schedule.

65. Based on the above facts, circumstances and grounds, Petitioner contended that the conduct of the Respondents, in voting contrary to the direction issued by the party, attracts the contents of Paragraph 2 (1) (b) of the Tenth Schedule and prayed that Respondents be disqualified in terms of Paragraph 2 (1) (b) of the Tenth Schedule of the Constitution of India.



66. Respondents answered the Petitioner by pleading the following:

- (a) Respondents were never in receipt of any alleged Whip dated 02<sup>nd</sup> July 2022. The said alleged Whip was never issued by the Petitioner and have been subsequently manufactured to create a façade that the Respondents defied the same.
- (b) At the relevant time of voting, i.e., on 03<sup>rd</sup> July 2022 and 04<sup>th</sup> July 2022, Shri Eknath Shinde was the rightfully appointed 'Leader' of the SSLP and Shri Baharat Gogawale was the Chief Whip of the Party. They represented the 'will and voice of the real Shiv Sena'.
- (c) Respondents have followed the 'will and whip' of the party and have never deviated from the path set up Shri Balasaheb Thackeray, the founder of the Party. On the contrary, it is the Petitioner who has voted against will and Whip of the party and therefore is liable to bear consequences of disqualification under Paragraph 2 (1) (b) of the Tenth Schedule.
- (d) Petitioner was no longer the authorised Whip of the party from 21<sup>st</sup> June 2022 onwards and thus he had no authority to issue any Whip of the party.



- (e) The Leader of the Legislature Party has the right to appoint/change the Chief Whip of the party. The acts of re-affirming the SSLP leader and the change of Chief Whip are not contrary to the wish/direction of the Shiv Sena Political Party as the same have been permitted and approved by the Shiv Sena Political Party and its *Mukhyaneta*.
- (f) Exercising a constitutional right by electing the Leader and the Chief Whip of the Party does not amount to voluntarily giving up the membership and defection under the Tenth Schedule.
- (g) Media reports cannot be a proof of anything and at the best they are nothing but hearsay.

67. Based on the above facts, circumstances and grounds, Respondents contended that Disqualification Petition is devoid of any merits and deserves to be dismissed.

### (III) EVIDENCE LED BY THE PARTIES

68. Even though, initially, Petitioner maintained the stand that he does not require an opportunity to lead evidence and urged that the hearing be held without there being the need of allowing parties to lead evidence, on 02<sup>nd</sup> November 2023<sup>18</sup>,



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<sup>18</sup> Speaker's Order dated 02<sup>nd</sup> November 2023

the Ld. Counsel for the Petitioner, stated that the Petitioner would also like to lead evidence in the matter. Thus, by consent of both the parties opportunity was accorded to both the Petitioner and the Respondents to lead evidence.

69. Petitioner filed *Affidavits in lieu of Chief Examination* of two witnesses; one being the Petitioner himself (PW-1) and the other being one Shri. Vijay Joshi (PW-2). Petitioner Shri. Sunil Prabhu more or less stated whatever was stated in the Disqualification Petitions in his *Affidavits in lieu of Chief Examination*. Certain originals of documents relied on by the Petitioner were also tendered along with Petitioner's *Affidavit in lieu of Chief Examination*. Relevant documents, being *inter-alia* the 'Resolution dated 21<sup>st</sup> June 2022' (*hereinafter referred to as the 'UBT Resolution dated 21<sup>st</sup> June 2022*) and the originals of whips, which the Petitioner claimed to have sent the legislature party members of the Shiv Sena.

70. Petitioner's second witness (PW-2) filed a very limited *Affidavit in lieu of Chief Examination* and stated that he was working in the *Shiv Sena Vidhimandal Karyalaya* in July 2022 and on instructions of Shri. Sunil Prabhu sent two Whips, dated 02<sup>nd</sup> July 2022.

71. Respondents filed six (6) *Affidavits in lieu of Examination*, of (i) Shri. Dilip Lande, (ii) Shri. Yogesh Kadam, (iii) Shri. Rahul



Shewale, (iv) Shri. Uday Samat, (v) Shri. Deepak Kesarkar, and (vi) Shri. Bharat Gogwale.

**72. Shri. Dilip Lande (RW-1)** in his *Evidence by way of Affidavit* dated 24<sup>th</sup> November 2023, deposed *inter alia* that:

- (a) He did not receive any whip dated 02.07.2022 from Shri. Sunil Prabhu for election of the Hon'ble Speaker to be held on 03.07.2022, nor did he receive any whip dated 02.07.2022 from Shri. Sunil Prabhu for voting contrary to the confidence motion to be held on 04.07.2022.
- (b) He had voted in accordance of the whip dated 04.07.2022.
- (c) He was present in the meeting dated 21.06.2022. He was informed by Sh. Sunil Prabhu that some of the SSLP members had decided to disqualify other SSLP members not present in the meeting. His opposition to the same was unheeded and he left the meeting.
- (d) He did not support/approve/second the resolution passed in meeting dated 22.06.2022. His name and signature on the resolution had been forged.
- (e) He had never done any act which would indicate him giving up membership of his party.



**73.Sh. Yogesh Kadam (RW-2)** in his *Evidence by way of Affidavit* dated 24<sup>th</sup> November 2023, deposed *inter alia* that:

- (a) On 21.06.2022, the majority members of the SSLP passed a resolution affirming Sh. Eknath Shinde as leader of the SSLP and appointed Shri Bharatseth Gogawale as Chief Whip of the party.
- (b) He received a copy of the letter dated 03.07.2022 issued by the Maharashtra Legislative Assembly Secretariat, wherein Shri. Eknath Shinde was recognized as Leader and Shri Bharatseth Gogawale as the Chief Whip of SSLP by Hon'ble Speaker.
- (c) He was in receipt of the Whip dated 04.07.2022 by which Shri. Bharat Gogawale as Chief Whip directed party members to vote in favor of Shiv Sena led government in the trust vote on 04.07.2022. He accordingly cast his vote in accordance with Whip dated 04.07.2022. No other whip from Shri Sunil Prabhu was received by him.
- (d) He had not done any act which would indicate that he had given up membership of his party.

**74.Sh. Rahul Shewale (RW-3)** in his *Evidence by way of Affidavit* dated 24<sup>th</sup> November 2023, deposed *inter alia* that:



- (a) Shri. Uddhav Thackeray refused to call for a meeting of Rashtriya Karyakarini, despite repeated requests, to address '*grievances and dissatisfaction*' prevalent amongst MLAs, party leaders, etc., on account of '*huge corruption*' in MVA Government.
- (b) There was a discontent within the party with respect to coalition with INC and NCP as founder of Shiv Sena Hindu Hridaya Samrat was a staunch opposer of the ideologies of parties like INC and NCP.
- (c) It was Shri Eknath Shinde who led the party from the front and took care of the grievances of all office bearers including elected representatives.
- (d) He was not a party to the alleged National Executive meeting dated 25.06.2022 nor did he receive any notice for this meeting, nor did he attend the same. These are forged and fabricated in as much as the meeting has been shown to be of '*Rashtriya Karyakarini Baithak (Pratinidhi Sabha)*.' Rashtriya Karyakarini and Pratinidhi Sabha are two different bodies under Shiv Sena Constitution and cannot be inter-changeably used.
- (e) He along with 12 Lok Sabha members belonging to Shiv Sena support and recognize Shri Eknath Shinde as true leader of Shiv Sena Party.





**75.Sh. Uday Samant (RW-4)** in his *Evidence by way of Affidavit* dated 24<sup>th</sup> November 2023, deposed *inter alia* that:

- (a) On 31.10.2019, members of SSLP called for a meeting and acknowledged the work and leadership of Shri Eknath Shinde and unanimously elected the latter to be leader of the party. Resolution passed in this meeting also indicates that authority to appoint a Group Leader and Chief Whip was with SSLP.
- (b) Shri Uddhav Thackeray was not a member of the Legislative Assembly. However, though Shri Uddhav Thackeray did not have any authority to take any decision in the meeting of SSLP, members of the SSLP agreed that Shri Uddhav Thackeray would chair the meeting for which he was authorized by the members of SSLP. Ultimate authority for election of Group Leader and Chief Whip of SSLP vests only with members of the SSLP. All decisions relating to legislature party are taken by majority members of SSLP.
- (c) He and other MLAs, MLCs, etc., were against forming the government with INC and NCP.
- (d) On 21.06.2022 Shri Gulabrao Patil contacted him and asked him to reach Varsha Bungalow for discussion



with Shri Uddhav Thackeray regarding political developments regarding the party and future course of action.

- (e) He and several other MLAs advised Shri. Uddhav Thackeray, that party should withdraw from coalition with NCP and INC. No resolution was moved in the meeting to remove Shri Eknath Shinde as Group Leader of Shiv Sena Legislature Party and to replace him with Shri Ajay Chaudhari. He did not second any resolution to that effect, nor did he sign alleged attendance register nor any other document. He had not drafted any alleged resolution of 21.06.2022.
- (f) He did not receive any whip from Shri Sunil Prabhu for election of Speaker of the Assembly to be conducted on 03.07.2022.
- (g) Whip dated 04.07.2022 was recognized by the Speaker of the House. Whip directed members to vote in favor of Shiv Sena party in trust vote on 04.07.2022. He had accordingly cast his vote on 04.07.2022 on the confidence motion.
- (h) He has never done any act which would indicate him giving up membership of Shiv Sena party.



**76.Sh. Deepak Kesarkar (RW-5)** in his *Evidence by way of Affidavit* dated 24<sup>th</sup> November 2023, deposed *inter alia* that:

- (a) He has not defected or left or voluntarily given up the membership of Shiv Sena Party.
- (b) It was only for a meeting on 31.10.2019 that it was agreed by the members of SSLP that Shri Uddhav Thackeray would chair the said meeting for which he was authorized by members of SSLP. Leaders of the party were always elected by members of SSLP. If it was not for the authority by SSLP, Shri Uddhav Thackeray did not have any authority to take any decisions in the meeting of SSLP, which vests only with the members of SSLP. Party President had no power to intervene with work of the Legislature Party under Shiv Sena Constitution. Decisions in that regard are taken on the basis of majority.
- (c) It is incorrect that he was incommunicado or in hiding, or that he was absent from party meeting dated 21.06.2022. He did not receive any whip for the meeting dated 21.06.2022. Shri Gulabrao Patil contacted him and informed him to attend the meeting of SSLP on 21.06.2022 at Varsha Bungalow, he attended the meeting.



- (d) No resolution was proposed from any member in the said meeting regarding removal of Shri Eknath Shinde as the group leader of Shiv Sena Legislature Party. He did not sign the attendance sheet/register for the meeting dated 21.06.2022. He did not receive any notice for the National Executive Meeting/*Pratinidhi Sabha* on 25.06.2022.
- (e) He had never done any act which would indicate that he had given up membership of the party.

**77.Sh. Bharat Gogawale** (*PW-1 in Group 5 & RW-6 in Groups 01, 03, 04, & 06*),) in his *Evidence by way of Affidavit* dated 24<sup>th</sup> November 2023, deposed *inter alia* that: (*to be noted that Shri. Bharat Gogawale has deposed, by common affidavit in lieu of examination in chief, as the PW-1 in Group 05 in which he is the Petitioner and for and on behalf of Respondents in Group 01, 03, 04, & 6.*)

- (a) Petitioner Shri Sunil Prabhu and Respondents in Petition No. 20 & 22-34 have acted against the interest of the party and voted against the member of Shiv Sena party in confidence motion on 04.07.2022.
- (b) As per the initial constitution, all decisions were to be taken by Shiv Sena Pramukh. However, the Constitution of Shiv Sena was amended to provide *inter party*



democracy. Since 1999, the party has followed a democratic process for taking intra party decisions.

- (c) Leaders of the party called for a meeting on 31.10.2019 under leadership of Shri Eknath Shinde of all newly elected MLAs of Shiv Sena Party. Acknowledging the work and leadership of Shri Eknath Shinde, they unanimously elected Shri Eknath Shinde to be leader of the SSLP.
- (d) Members of the SSLP agreed that Shri Uddhav Thackeray would chair the meeting dated 31.10.2019, only for the purpose of the meeting. Leaders of the party are always elected by members of SSLP.
- (e) He and several other colleagues were threatened with arrests and physical harm by Shri Sanjay Raut. So left with no other option; he and some of his colleagues had to flee Maharashtra on 21.06.2022.
- (f) On 21.06.2022 Sh. Milind Narvekar and Mr. Ravindra Phatak approached Shri Eknath Shinde and informed them that discussions were held by Shri Uddhav Thackeray and some minority members of SSLP wherein Shri Uddhav Thackeray had agreed to end MVA Coalition and resolve intra party disputes. He, however, learnt subsequently that a different resolution was



passed; and using names and signatures of some of the MLAs and it was *illegally* resolved that Sh. Ajay Choudhary would be the leader of the SSLP.

- (g) The majority of the members passed a unanimous resolution on 21.06.2022 electing and re-affirming Shri Eknath Shinde as the leader of the party. It was also resolved that he [Shri. Bharatseth Gogawale] will be the Chief Whip of the SSLP in the Maharashtra State Assembly.
- (h) Acting as the Chief Whip, he had issued the whip dated 04.07.2022. Some of the members voted against the whip by their conduct made attempt to overthrow the Government by orchestrating defections in the SSLP. By doing so, delinquent MLAs had voluntarily given up membership of SSLP and Shiv Sena Political Party. Disqualification Petition has been filed accordingly.

#### (IV) ISSUES FOR DETERMINATION

78. The Hon'ble Supreme Court, in *Subash Desai Vs. Governor of Maharashtra*,<sup>19</sup> (hereinafter referred to as '*Subash Desai*'), was pleased to direct that "*the Speaker should prima facie determine 'who the real political party is' for the purpose of adjudicating disqualification petitions, if two or more factions claim to be that*

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<sup>19</sup> 2023 SCC Online SC 607



*political party” and accordingly “shall recognise the Whip and the Leader who were duly authorised by the Shiv Sena Political Party” keeping with the principles discussed in the said judgement.<sup>20</sup>*

79. Hence, keeping in view the factual matrix and the directions of the Hon’ble Supreme Court, I will *prima facie* determine “*who the political party is for the purpose of adjudicating disqualification petitions, if two or more factions claim to be that political party” and accordingly “recognise the Whip and the Leader who were duly authorised by the Shiv Sena Political Party” keeping in mind principles discussed in Subash Desai (Supra).* It is necessary to consider and determine the said preliminary issue before examining the merits and deciding whether Respondents have incurred disqualification under the Tenth Schedule of the Constitution of India.

80. Thus, the preliminary issue that arises for my consideration, before delving into the merits of disqualification petitions under the Tenth Schedule, is “Which among the two factions was the “real” Shiv Sena Political Party and consequently who was the duly authorised Leader and/or the Whip of the Shiv Sena Political Party for the purpose of deciding the present disqualification petitions?”.



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<sup>20</sup> Paragraph 206 (d) & (g) of Subash Desai

81. The other issue framed for my consideration, in this Group of Disqualification Petitions, i.e., Group 06, is “Whether the Respondents have incurred disqualification in terms of Paragraph 2 (1) (b) of the Tenth Schedule of the Constitution of India on account of their (alleged) acts, omissions and/or conduct?”

**(V) ANALYSIS, OBSERVATIONS AND FINDINGS**

*A. Which among the two factions is the “real” Shiv Sena Political Party for the purpose of deciding the present disqualification petitions?*

82. Hon’ble Supreme Court of India, in paragraph 119 of *Subash Desai (Supra)*<sup>21</sup>, while discussing the legality of the recognition of ‘Leader’ and the ‘Whip’ of Shiv Sena accorded by the Letter dated 03<sup>rd</sup> July 2022, held that the Speaker ought to have taken into consideration the ‘split’ that took place within the Shiv Sena which were discernible from two sets of resolutions, appointing two different ‘leaders’ and ‘whips’ placed on record by the Shiv Sena before the Legislature Secretariat. This aforesaid paragraph of *Subash Desai* (119) read with paragraph 157 of *Subash Desai (Supra)*<sup>22</sup>, makes it clear that the law laid down by the Hon’ble Supreme Court is that ‘in view of the deletion of ‘Paragraph 03 of the Tenth Schedule’, when rival

<sup>21</sup> Paragraph 119 of *Subash Desai (Supra)*

<sup>22</sup> Paragraph 157 of *Subash Desai (Supra)*





factions emerge as a result of rift/split in a party, the Speaker has to necessarily find which faction is the real political party while recognising 'leader' and the 'whip' of the party, especially where there are rival claims seeking appointment.

83. Thus, in view of the fact that in the present matter, rival factions have emerged<sup>23</sup> and both the factions claim to be the real political party read with the direction of the Hon'ble Supreme Court, in *Subash Desai (Supra)*, that this Forum should *prima facie* determine "*who the political party is for the purpose of adjudicating disqualification petitions, if two or more factions claim to be that political party and accordingly shall recognise the Whip and the Leader who are duly authorised by the Shiv Sena Political Party keeping with the principles discussed in the said judgement*"<sup>24</sup>, it is necessary to consider and determine the said preliminary issue before recognising the 'leader' and the 'whip' who were duly authorised by the 'real political party' when the rival factions emerged and then in turn examine the merits of these disqualification petitions.

*Principles laid down by the Hon'ble Supreme Court in Subash Desai relevant for the purpose of determining who the political party is.*

84. Before discussing 'who the political party is for the purpose of adjudicating disqualification petitions' it is imperative to set



<sup>23</sup> Finding that rival factions have emerged is recorded in Paragraphs 119 of Subash Desai.

<sup>24</sup> *Subash Desai* Paragraphs 124, 157, 163, 164, 167, 168 & 206 (d) & (g).

out the principles laid down by the Hon'ble Supreme Court in *Subash Desai (Supra)* for this purpose. These are as follows:

- (a) *When the conduct prohibited under the Tenth Schedule is (allegedly) committed, there is only one political party. This necessitates the Speaker prima facie determining who the political party was at the time of the alleged act which allegedly attract the provisions of the Tenth Schedule.*<sup>25</sup>
- (b) *Paragraph 6 of the Tenth Schedule entrusts the Speaker of the House with the authority to adjudicate disqualification petitions. While adjudicating a disqualification petition, the Speaker must also consider any defence(s) raised by the member against whom the petition has been filed. The Tenth Schedule, as it currently stands, specifies five defences which a member may take recourse to, to shield themselves from the consequences of the anti-defection law.*<sup>26</sup>
- (c) *Both factions of the Shiv Sena claiming to be the "real" Shiv Sena, in effect, points to the existence of a split within the SSLP. However, no faction or group can argue that they constitute the real political party as a defence against disqualification on the ground of defection.*<sup>27</sup>



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<sup>25</sup> Paragraph No. 157 of *Subash Desai*.

<sup>26</sup> Paragraph No. 161 of *Subash Desai*.

<sup>27</sup> Paragraph No. 163 of *Subash Desai*.

- (d) *The inevitable consequence of the deletion of Paragraph 3 from the Tenth Schedule is that the defence of a split is no longer available to members who face disqualification proceedings. In cases where a split has occurred in a political party or in a legislature party, members of neither faction may validly raise the defence that they are the political party in the event that each faction files petitions for the disqualification of members of the other faction. The defence sought to be availed of must be found within the Tenth Schedule as it currently stands.*<sup>28</sup>
- (e) *Members of multiple groups or factions can all continue as members of the House if the requirements of Paragraph 4(1) of the Tenth Schedule are satisfied. Two (or more) factions of a political party can both remain in the House if one of the factions has opted to merge with another political party in terms of Paragraph 4(1)(a) and the other faction has chosen not to accept the merger. However, in cases where a split has occurred, and members of one of the factions are found to have satisfied the conditions in Paragraph 2(1) and are also unable to establish any of the five defences available under the Tenth Schedule, they would stand disqualified. The percentage of members in each faction is irrelevant to the determination of whether a defence to disqualification is made out.*<sup>29</sup> *This is necessarily the implication of the deletion of Paragraph 3. To hold otherwise would be to permit the entry of the defence of*



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<sup>28</sup> Paragraph No. 164 of Subash Desai.

<sup>29</sup> Paragraph No. 165 of Subash Desai.

*'split' in the Tenth Schedule through the back door. This is impermissible and would render the deletion of Paragraph 3 meaningless. It is imperative law that what cannot be done directly cannot be permitted to be done indirectly. The interpretation which we have expounded is the only one which comports with the deletion of Paragraph 3.<sup>30</sup>*

(f) *Regardless of the defence available to members who face disqualification proceedings, the Speaker may be called upon to determine who the "real" political party is while adjudicating disqualification petitions under Paragraph 2(1)(a) where two or more factions of the political or legislature party have arisen. The effect of the deletion of Paragraph 3 is that both factions cannot be considered to constitute the original political party. In order to determine which (if any) of the members of the party have voluntarily given up membership of the political party under Paragraph 2(1)(a), it is necessary to first determine which of the factions constitute the political party. This determination is a prima facie determination and will not impact any other proceedings including the proceedings under Paragraph 15 of the Symbols Order.<sup>31</sup>*

(g) *In arriving at their decision, the Speaker must consider the constitution of the party as well as any other rules and*



<sup>30</sup> Paragraph No. 166 of Subash Desai.

<sup>31</sup> Paragraph No. 167 of Subash Desai

regulations which specify the structure of the leadership of the party. If the rival groups submit two or more versions of the party constitution, the Speaker must consider the version which was submitted to the ECI before the rival factions emerged. In other words, the Speaker must consider the version of the party constitution which was submitted to the ECI with the consent of both factions. This will obviate a situation where both factions attempt to amend the constitution to serve their own ends. Further, the Speaker must not base their decision as to which group constitutes the political party on a blind appreciation of which group possesses a majority in the Legislative Assembly. This is not a game of numbers, but of something more. The structure of leadership outside the Legislative Assembly is a consideration which is relevant to the determination of this issue.<sup>32</sup>

- (h) The deletion of Paragraph 3 impacts the proceedings under Paragraph 2(1)(b) as well. When there are two Whips appointed by two or more factions of the political party the Speaker must decide which of the two Whips represents the political party. Thus, the adjudication of the Speaker on whether a member must be disqualified under Paragraph 2(1)(b) would also depend on the decision of the Speaker recognising one of the two (or more) Whips.<sup>33</sup>



<sup>32</sup> Paragraph No. 168 of Subash Desai

<sup>33</sup> Paragraph No. 169 of Subash Desai

85. Thus, what emerges from the principles laid down by the Hon'ble Apex Court is that the question of 'who the real political party is', has to be considered and determined after giving due weightage to (i) *the constitution of the Shiv Sena*, (ii) *the leadership structure of the party* and (iii) *the legislative majority*, if two or more factions claim to be the real political party. (*'the question of who the real political party is', is hereinafter referred to as the 'preliminary issue'*)

86. Since, in these proceedings both the factions are claiming to be the 'real political party' at the relevant point in time, and as the said issue arose for determination in these proceedings, on 02<sup>nd</sup> November 2023, the said preliminary issue was also framed as one of the issues in these disqualification petitions, thereby affording an opportunity to the parties to make their submissions on this point. Further, even during the hearing on 12<sup>th</sup> December 2023, both the parties were specifically asked as to whether any of the parties to the Disqualification Petitions or the Leaders of their respective factions would like to advance any further written submissions, affidavits and/or documents on the issue of "Real Political Party". Ld. Counsel for the Petitioner, submitted that the enquiry prescribed by the Hon'ble Supreme Court in *Subash Desai (Supra)*, is not an enquiry independent to that of the present proceedings under the Tenth Schedule of the Constitution and thus the said



enquiry means that the Speaker has to decide the issue of 'real political party' as a preliminary issue while adjudicating these disqualification petitions. Likewise, Ld. Counsel for the Respondents submitted that they also do not need any such further opportunity and consented with the Petitioner on going ahead with the final hearing without any further submissions or filings on the said issue. Further, both the parties were asked if an opportunity is required to be given to the 'Leaders' of each faction, i.e., Shri. Eknath Shinde and Shri. Uddhav Thackeray, to make any submissions as 'leaders', pertaining to the issue of 'real political party'. Thereupon, Ld. Counsel for the Petitioner submitted that, such an opportunity was not required for the purpose of deciding 'who the real political party is' in these disqualification proceedings, and even otherwise the Petitioner Shri. Sunil Prabhu represented the interests of the leader and will of their faction for the purpose of deciding all issues concerned in these proceedings. Similarly, Respondents submitted that such a chance was not required since the Leader Shri. Eknath Shinde himself is a party Respondent in these proceedings.

87. The disinclination of parties to address me on this issue makes it clear that, I proceed to consider and adjudicate on this. Therefore, I would be adjudicating the said *preliminary issue* based on (i) the principles laid down by the Hon'ble Apex



Court, (ii) record available with the Maharashtra Legislature Secretariat and (iii) submissions made and documents referred to by the parties during the course of the hearing in these disqualification petitions.

*Petitioner's submissions on the preliminary issue*

88. As noted earlier, Ld. Sr. Adv. Mr. Devadatt Kamat at the outset submitted that the enquiry prescribed by the Hon'ble Supreme Court in *Subash Desai (Supra)* is not an enquiry independent to that of the present proceedings under the Tenth Schedule of the Constitution. He further submitted that the enquiry mandated by the Hon'ble Supreme Court in '*Subash Desai (Supra)*' has to be read to mean that the Speaker has to decide the issue of 'real political party' as a preliminary issue while adjudicating these disqualification petitions without parties having to lead evidence on the issue. He further submitted that the Speaker would have had to decide this issue preliminarily even if parties had not set up any plea in the said regard.
89. Mr. Kamat has made lengthy submissions on the purport of what constitutes a 'prima facie' determination and what are the elements which are to be looked into while adjudicating an issue on a prima facie basis. Submissions of Ld. Sr. Adv. Mr.





Kamat on the issue of 'who the real political party is' are as follows:

Petitioner's submissions on Leadership Structure

- (a) The 'prima facie determination' by the Speaker cannot involve adjudication of the legality or otherwise of the political leadership as it exists on the records of the ECI. The communication of results of the organisational elections to the ECI cannot be disputed in the instant proceedings at the behest of a person accused of defection, particularly since it is only a 'prima facie determination'. The 'prima facie determination' envisaged under the Tenth Schedule to identify 'who the political party is', cannot in any manner be an exercise to adjudicate the validity of organisational elections which were conducted five years ago, and never challenged before a competent Court of law.<sup>34</sup>
- (b) At the time when the impugned acts in the present proceedings were committed (June-July of 2022), the leadership structure of the party as communicated to the Election Commission in the year 2018 (for the term 2018-2023) is the leadership structure that must form the basis of adjudication of these petitions. The said leadership structure can be discerned from the letter dated



<sup>34</sup> Paragraph No. 74 of 'Written submissions of Mr. Devadatt Kamat, Sr. Adv., on behalf of the Petitioner (hereinafter referred to as Kamat's WS).

27.02.2018.<sup>35</sup> Thus, for the purposes of 'prima facie determination', the Shiv Sena political party at the relevant time in June-July 2022 was headed by Shri Uddhav Thackeray, the Party President. Given the role ascribed to the party president under the 1999 and the 2018 Party Constitutions, it is the Party President who represented the will of the political party for the purposes of these proceedings.<sup>36</sup>

(c) Even in the *Rashtriya Karyakarini*, the next most significant body in the organizational structure after the Party President, Shri Uddhav Thackeray enjoyed overwhelming majority and support at the relevant time, i.e., in June-July 2022. The overwhelming support enjoyed by Shri. Uddhav Thackeray amongst the members of the *Rashtriya Karyakarini* is evident from, (i) the affidavits dated 25.06.2022 executed by 9 out of 13 members of the *Rashtriya Karyakarini* in favour of Shri. Uddhav Thackeray, and (ii) the complete lack of any affidavits of support by members of the *Rashtriya Karyakarini* in favour of Shri. Eknath Shinde.<sup>37</sup>

(d) As per the leadership structure communicated to the ECI in pursuance to the organizational elections held in



<sup>35</sup> Paragraph No. 76 of Kamat's WS

<sup>36</sup> Paragraph No. 77 of Kamat's WS

<sup>37</sup> Paragraph No. 79 & 80 of Kamat's WS

2018 Shri. Udhav Thackeray, at the relevant time, enjoyed the support of (i) 7 leaders out of 9 elected leaders, (ii) 11 deputy leaders out of 21 elected deputy leaders, (iii) 2 out of 4 appointed leaders, and (iv) 7 out of 12 appointed deputy leaders.<sup>38</sup>

- (e) The results of the organisational elections cannot be negated by a bald denial in the present disqualification proceedings after almost 5 years of conclusion of the elections. No challenge was made to the results of 2018 elections by any person before the competent forum. The binding nature of outcome of 2018 organisational elections cannot be wished away by bald denials in the pleadings of the Respondents. It is a well-accepted doctrine that the official records cannot be wished away or argued to be non-existent without laying down a challenge before the competent forum and succeeding in a manner known to law. It is well settled that even an illegal order is to be challenged in the manner known to law and get it set aside by a due procedure.<sup>39</sup>
- (f) Beneficiaries/participants of the 2018 organizational elections cannot turn around and assail the result of the organizational elections.<sup>40</sup>



<sup>38</sup> Paragraph No. 81 to 88 of Kamat's WS

<sup>39</sup> Paragraph No. 92 of Kamat's WS

<sup>40</sup> Paragraph No. 96 of Kamat's WS

- (g) In these proceedings, the Respondents cannot challenge the organizational election results available on the record of the ECI as the Tenth Schedule does not permit the raising of any such defense.

*Petitioner's submissions on the Constitution*

- (h) 2018 constitution being not taken on record by the ECI cannot be ground for invalidating the leadership structure of 2018 and for the purpose of deciding the preliminary issue, 2018 constitution has to be considered as both the parties have relied upon the 2018 amended constitution and acted thereon. In this regard, it has to be noted that the Election Commission in its order dated 17.02.2023 in Dispute Case No. 1 of 2022 has held that both the parties were aware of the 2018 amendment.
- (i) The Respondents themselves in their respective replies have filed the 2018 amended constitution as Annexure R-18. Even during the Evidence, the Respondents have admitted the existence and knowledge of the 2018 constitution, which is evident from the Cross Examination of Shri. Dilip Lande (*Question No. 43 of the Cross Examination held on 07<sup>th</sup> December 2023*).



- (j) The statement of Yogesh Kadam on 08.12.2022 that filing of the 2018 amended constitution was 'a mistake by the lawyer', is a complete afterthought. The Respondent Shri Yogesh Kadam filed his replies to the disqualification petitions in the month of August 2022. On 25.10.2023, Shri Yogesh Kadam filed an additional reply containing detailed averments pertaining to the 2018 amended party constitution as well as the 1999 party constitution. On 25.11.2023, Shri Yogesh Kadam filed his evidence by way of Affidavit, however, did not state anything relating to the 2018 amended constitution. The statement that the Annexure R-18 was a mistake of lawyer made by Shri Yogesh Kadam on the very next day i.e., on 08.12.2023 after the admission of Shri Dilip Lande regarding the Annexure R-18. The fact that the witness made a statement even prior to the commencement of his Examination-in-Chief makes it amply clear that the said statement was made by the Respondent after being tutored by his counsels to overcome the admissions made by Shri Dilip Lande. Further, Shri Yogesh Kadam has stated in cross examination in answer to question No. 5 that he was not aware of the amended constitution prior to 07.12.2023. If that was the case it was not possible that his Additional Reply dated 25.10.2023,



submissions were made on the 2018 amended constitution.

Respondents' submissions on the preliminary issue

90. Appearing for the Respondents, Ld. Sr. Adv. Mr. Mahesh Jethmalani submitted at the outset that this preliminary issue might not have to be considered at all as even otherwise the alleged conducts of the Respondents do not attract the provisions of the Tenth Schedule (*as submitted in response to the second issue in these disqualification petitions*). However, in the alternative Mr. Jethmalani made the following submissions:

- (a) Alleged leadership structure of 2018, as is claimed by the Petitioner, cannot be relied upon as the same arises out of a constitution which is not on record of the Election Commission of India. Further, it is to be also noted that no organisational elections were held in the year 2018 or even prior to that. In view thereof, the said purported leadership structure cannot be relied upon.
- (b) The existence and contents of the Letter dated 27<sup>th</sup> February 2018, by way of which the alleged leadership structure was purportedly communicated to the ECI, was specifically denied by the Respondents. However,



even then the Petitioner did not bring forth the author of the said letter to prove its existence.

- (c) It is relevant to note that the organisational structure as submitted by way of the purported letter dated 27<sup>th</sup> February 2018 to the Election Commission of India is in no manner concurring with the constitution of the Shiv Sena as provided by the Election Commission to the Speaker.
- (d) The purported leadership structure reflected in the alleged letter dated 27<sup>th</sup> February 2018 as submitted by the Petitioner included members nominated and/or appointed by Shri. Uddhav Thackeray to the posts of Secretary, Samanvayak and Sangathak. Admittedly, these posts never existed in the Constitution of 1999.
- (e) The purported leadership structure reflected in the alleged letter dated 27<sup>th</sup> February 2018 as submitted by the Petitioner has a total of 33 Deputy Leaders (21 by way of election and 12 appointed by sole discretion of Sh. Uddhav Thackeray). However, as per the Constitution of 1999, only 21 posts existed for Deputy Leaders (17 to be elected and 4 to be appointed). Hence the additional number of positions identified as being Deputy Leaders being appointed at the sole discretion of



Shri. Uddhav Thackeray does not conform with the Constitution of 1999.

- (f) The leadership structure of the party, reflected in the alleged letter dated 27<sup>th</sup> February 2018 as submitted by the Petitioner, is inconsistent with the leadership structure of the party as per the Constitution of 1999 and hence the leadership structure reflected in the alleged letter dated 27<sup>th</sup> February 2018 cannot be relied on by the Petitioner to claim that Shri. Uddhav Thackeray was enjoying the support of the leadership/organizational structure of the political party.
- (g) Alleged Meeting of the 'National Executive' purportedly held on 25<sup>th</sup> June 2022 is illegal as it is not clear as to when and by whom this meeting was convened; when and by whom notice of this meeting was issued; when, how and to whom the notice of this meeting was served on the members of *Pratindhi Sabha*; how many member of *Pratinidhi Sabha* were present, what was the agenda of this specially convened meeting, etc. Furthermore, the *Marathi* version of these documents is a clear give away in as much as an attempt was made to mix up *Pratinidhi Sabha* and *Rashtriya Karyakarini* as one and the same body.





- (h) It will not be out of place to mention that the reliance on Section 29A of Representation of Peoples Act, 1951 is misleading in view of the judgment dated 17<sup>th</sup> February 2023 passed by the Hon'ble Election Commission of India in Dispute Case No. 1 of 2022.
- (i) The elected representatives from the Shiv Sena, (i.e., Members of Legislative Assembly as well as Members of Parliament) are admittedly part of the leadership structure as per the Shiv Sena Constitution. While there are serious doubts regarding the leadership structure as relied upon by the Petitioner, there can be no dispute insofar as the elected representatives are concerned. Thus, the only undisputed leadership structure under the SS Constitution, which can be considered by the Speaker in the present proceedings is the 'elected representatives', i.e., Member of Lok Sabha and Members of Legislative Assembly.

**Analysis, observations, and conclusions on the preliminary issue**

91. As stated earlier, the decision on the *preliminary issue* has to be taken after a careful analysis of (i) the constitution of the Shiv Sena, (ii) the leadership structure of the party and (iii) the legislature party majority.



92. After having heard both the sides on the above aspect, I now propose to proceed to record my observations and findings on the preliminary issue.
93. As is evident from the submissions of the parties, there is no consensus on the '*constitution submitted to the election commission of India with consent of both the factions*'. Likewise, the parties have different points of view on the '*leadership structure*' which has to be taken into consideration. The only aspect which is undisputed is the majority in the legislature party. Hence, to embark upon the findings on the preliminary issue, I will have to decide (i) the relevant constitution which has to be taken into account and (ii) the leadership structure which existed before the dispute arose. Further, it will also have to be determined as to "when the rival factions emerged".

*The relevant Party Constitution considered*

94. Petitioner's assertion that the Constitution of the year 2018 is the relevant constitution which has to be taken into account for the purpose of determining the *preliminary issue*, is based on the submissions that (i) the 2018 constitution has to be considered as both the parties have relied upon the 2018 amended constitution and acted thereon, (ii) the Election



Commission in its order dated 17.02.2023 in Dispute Case No. 1 of 2022 has held that, both the parties were aware of the 2018 amendment and thus the said constitution of 2018 has to be taken as the constitution which is done with the consent of both the factions as the said constitution of 2018 was never disputed prior to the initiation of these disqualification petitions and the same was never challenged (iii) Respondents have themselves admitted and relied on the said Constitution of 2018, and (iv) the statement of Shri. Yogesh Kadam that the filing of 2018 Constitution along with Respondents reply was a mistake done by the lawyers cannot be accepted as the said statement is an afterthought and done only with an intention to mitigate the damaging statement made by Shri. Dilip Lande.

95. To the contrary, Respondents have asserted that the Constitution of the year 1999 has to be the one which has to be borne in mind, as according to the Respondents the Constitution of the year 2018 was never submitted to the ECI. Respondents pointed out to the Letter dated 04<sup>th</sup> April 2018, by way of which the Petitioner base their claim of submission of the said constitution to the ECI. By pointing out to the same, Respondents submitted that both the said Letters do not mention anything about the purported amendment to the constitution or submission of the same thereof to the ECI and



a similar claim was made with respect to the letter dated 27.02.2018 by Shri. Uddhav Thackeray in the *Special Leave Petition (C) No. 3997 of 2022*, however in the said SLP there was no mention about the existence of any such letter dated 04<sup>th</sup> April 2018. The word '*submitted*' appearing in Paragraph 168 of *Subhash Desai* means submitted before the ECI, as is evident from the further part of the said paragraph, which the Petitioner has conveniently ignored. The Respondents have further submitted that the 2018 Constitution has been wrongly annexed as a document. Respondents further submitted that the stand of the Respondents on the 2018 Constitution has always been that it is unconstitutional and was secretly manufactured by Shri Uddhav Thackeray in cahoots with Mr. Anil Desai. This stand has been specifically taken in the Reply filed by Shri Eknath Shinde before the Hon'ble Supreme Court in SLP (C) No. 3997 of 2023 way back on 16.03.2023, i.e., much before filing of replies before the Speaker in August 2023. Further, even in the Additional Replies filed on 25.10.2023, in the present proceedings, the aforesaid position has been reiterated by the Respondents.

96. After having considered the submissions advanced by both the parties on the question as to which is the relevant constitution for the purpose of determination of the '*preliminary issue*' I have come to the following conclusions.



- (a) As per the Hon'ble Apex Court<sup>41</sup>, if both the factions have submitted different versions of the constitution of the party, then in that case what has to be taken into account is the constitution which was submitted to the ECI with the consent of both the parties before the rival factions emerged.
- (b) Before recording further conclusions I find it imperative to reiterate that, pursuant to the initiation of these disqualifications the Maharashtra Legislature Secretariat had, *vide* Letter dated 07<sup>th</sup> June 2023, requested the office of the Election Commission of India to provide a copy of the 'Party Constitution/Memorandum/Rules and Regulations (*whether known as such or by any other name*) of Shiv Sena Political Party which have been submitted to the Election Commission of India and stand effective as on 21<sup>st</sup> June 2022. It is also pertinent to mention that in the said letter it was specifically requested to the Election Commission of India that copies of all subsequent amendments, if any, to the constitution be also provided. In response to the said Letter, the Election Commission of India, *vide* Letter dated 22<sup>nd</sup> June 2023, provided a copy of the Constitution and Rules of Shiv Sena as available on the records of the Election Commission of India. Further,



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<sup>41</sup> *Subash Desai* Paragraph 167 & 168

with respect the amendments (if any) to the said constitution of the party, the Election Commission requested the legislature secretariat to refer the Order dated 17<sup>th</sup> February 2023 passed by the ECI in Dispute Case No. 01 of 2022.

- (c) Having perused the same, it has to be noted that the copy of the Constitution of the Shiv Sena provided by the ECI does not bear any date or year but as per the ECI that which is provided *vide* their reply is the only 'Constitution of Shiv Sena' available on the record of the ECI. Further, with respect to the amendments, if any, to the said constitution, the Election Commission *vide* its Order dated 17<sup>th</sup> February 2023 has held in Paragraph 132 (IV) (b) that "*the amended constitution of 2018 is not on the record of the commission*".
- (d) Thus, the Petitioner's submission that the constitution of the year 2018 has to be taken into account cannot be accepted as I am bound to follow the directions of the Hon'ble Apex Court in *Subash Desai (Supra)* and accordingly take into account the Constitution what the Election Commission has provided. In my jurisdiction under the Tenth Schedule of the Constitution I cannot delve into any other factors while deciding 'which is the relevant constitution', as *prima facie* it is evident from the



record of the ECI that the 1999 constitution is the one which was submitted to the ECI by the Shiv Sena before rival factions emerged.

- (e) Further, it is also necessary to mention that the Petitioner's submission that the 'Constitution of the year 2018' was submitted to the ECI by referring to the Letter dated 04th April 2018 cannot be accepted. A bare perusal of the said Letter dated 04th April 2018, by way of which the Petitioner base their claim of submission of the said constitution to the ECI, does not bear any content which shows that an amended constitution was submitted to the ECI. The said letter only refers to the elections held and the results thereof and nothing more. Further, on closer examination of the Special Leave Petition filed by Mr. Uddhav Thackeray before the Hon'ble Supreme Court challenging the ECI decision (SLP (C) No. 3997 of 2022), I find that exactly same claim has been made about the letter dated 27.02.2018 and there is no mention about this new letter of 04<sup>th</sup> April 2018. Admittedly, the said letter of 27.02.2018 is on the website of the Election Commission of India. However, there is no document relating to the constitution annexed to it. Hence, on this ground also Petitioner's submission that the constitution of the year 2018 has to be taken into account cannot be accepted.



(f) Petitioner's submission that 'submitted' before the Speaker would mean 'annexed' by the Petitioner and the Respondents in their respective Petitions and Replies thereto, cannot be accepted as there is a clear provision under the 1986 rules where the 'Leader' has to submit the party constitution. Rule 3 (1) (b) of the 1986 Rules mandates that the 'Leader' shall furnish "*a copy of the rules and regulations, (whether known as such or as Constitution or by any other name) of the political party concerned*"<sup>42</sup>. Further, Rule 3 (4)<sup>43</sup> contemplates that "*whenever any change takes place in the information furnished by the leader of the legislature party under Rule 3 (1) he shall, as soon as may be thereafter and in any case within thirty days from the date on which such change has taken place or within such further period as the Speaker may for sufficient cause allows, furnish in writing information to the Speaker with respect to such change*". Thus, the 'submission of constitution' before the Speaker has to mean submission under the said Rule 3 of 1986 Rules. However, till date Shiv Sena has not submitted any Constitution on the record of the Speaker under the said Rule 3.

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<sup>42</sup> Rule 3 (1) (b) of The Members of Maharashtra Legislative Assembly (Disqualification on Ground of Defection) Rules, 1986.

<sup>43</sup> Rule 3 (4) of The Members of Maharashtra Legislative Assembly (Disqualification on Ground of Defection) Rules, 1986.





97. In view of the above observations and findings, I need not further analyse any other submissions in this regard made by the parties, and I hold that the 'Constitution of Shiv Sena provided by the Election Commission of India, vide Letter dated 22<sup>nd</sup> June 2023', is the relevant Constitution of Shiv Sena for determination of the preliminary issue as to 'which faction is the real political party'. (*Constitution of the Shiv Sena held so to be the relevant Constitution is hereinafter referred to as the 'SS Constitution'*)

*The 'Leadership Structure' relevant for the determination*

98. Ld. Sr. Adv. Mr. Kamat's submission that "*the 'leadership structure' which is relevant for the purpose of deciding the preliminary issue is the 'leadership structure' which is reflected in the communications dated 27<sup>th</sup> February 2018 and 04<sup>th</sup> April 2018 made to the Election Commission of India pursuant to the Elections held on 23<sup>rd</sup> January 2018*" is based on the Petitioner's submission recorded in Paragraphs 89 (a) to (g) hereinabove. Initially the Petitioner relied on the affidavits submitted to the ECI, (of the then office bearers of Shiv Sena) produced along with the *Affidavit in lieu of Examination in Chief*, to show that Shri. Uddhav Thackeray had support of the majority in the organization. Respondents objected to such production on the ground that it is not permissible to produce affidavits of others along with Petitioner's own *Affidavit in lieu of Chief*



*Examination* without the authors of the said affidavits subjecting themselves to cross examinations. In any event, during arguments, Mr. Kamat did not rely on these affidavits and limited his submissions to the 2018 leadership structure as available on the ECI website.

99. Mr. Jethmalani, in turn focused his submissions to buttress the ground that the said leadership structure of 2018 cannot be considered and relied upon for the purpose of determining the preliminary issue as the said leadership structure is not in conformity with the Constitution of the Shiv Sena which is on record of the ECI and thus the same would be contrary to the findings of the Hon'ble Supreme Court in paragraph 168 of *Subhash Desai*. Mr. Jethmalani, further relied on the 'legislative party' leadership to submit that the 'legislative party' also forms part of the leadership structure as it is not only mentioned in the 'SS Constitution', but there is no dispute regarding the said members being part of the '*Pratinidhi Sabha*' under the 'SS Constitution'.
100. After having considered the submissions advanced by both the parties on the question as to which is the relevant 'leadership structure' for the purpose of determination of the 'preliminary issue' I have come to the following conclusions.



- (a) The submission of Mr. Kamat that *“the jurisdiction under Tenth Schedule only mandates a prima facie adjudication as to ‘what the leadership structure of the political party was at the relevant time’ and it does not extend to an inquiry as to whether or not the leadership structure, available on the record of the ECI, was pursuant to a validly held election,”* is a correct proposition and hence I concur with the same.
- (b) Petitioner’s submission that *“in these proceedings, the Respondents cannot challenge the organizational election results available on the record of the ECI, as the Tenth Schedule does not permit the raising of any such defense”* is a correct proposition and hence I am in agreement with the same.
- (c) Respondent’s submission that *“the said leadership structure of 2018 cannot be considered and relied upon for the purpose of determining the preliminary issue as the said leadership structure is not in conformity with the Constitution of the Shiv Sena which is on record of the ECI”* does not arise at this juncture and it is a submission which has to be considered while determining whether the said leadership structure can be relied upon for the purpose of determining which faction represents the real political party, which would be dealt with at the appropriate juncture. The only question which is to be



determined in the current part of the order is 'what and who all constituted the leadership structure of Shiv Sena' at the relevant time.

- (d) Respondents have led detailed evidence and despite being confronted during cross examination; they have been able to demonstrate that no organizational elections were held on 23.01.2018. On the contrary, in the *Affidavit in lieu of Examination in Chief* of Shri. Sunil Prabhu (PW-1) has stated that organizational elections were held on 23.01.2013 and 23.01.2018. However, Shri. Sunil Prabhu has not claimed any personal knowledge of the same or whether he was present during the said elections. During his cross examination, he was confronted with the letter dated 28.01.2013. Thereafter a specific question was posed to him by Mr. Jethmalani as to '*whether he voted in the said election*'. To which he responded in the affirmative. The contents of the said letter clearly stated that '*all the candidates were declared unopposed*'. This contradiction was also put to the witness by Mr. Jethmalani in cross examination. However, no justification for the same was put forth by the witness. In view of the above, evidence and records before me *prima facie* indicate that no elections were held in the year 2013 as well as in the year 2018. However, I,



as the Speaker, exercising jurisdiction under the Tenth Schedule, has a limited jurisdiction and cannot go beyond the record of the ECI as available on the website and hence I have not considered this aspect while determining the 'relevant leadership structure'.

101. Thus, in view of the above conclusions, I find that the leadership structure of the Shiv Sena reflected in the Letter dated 27<sup>th</sup> February 2018 (available on the website of the ECI) is the relevant leadership structure which has to be taken into account for the purpose of determining which faction is the real political party. The question whether '*which faction is the real party*' is discernible from this '2018 leadership structure' is discussed in Paragraphs 112 to 131 (*infra*) of the present order.

*(the leadership structure so determined as the relevant leadership structure for the purposes of these disqualification petitions are hereinafter referred to as the '2018 Leadership Structure'.)*

*When did the rival factions emerge?*

102. Since, in these proceedings both the factions are claiming to be the 'real political party' *rival factions have emerged* in the Shiv Sena<sup>44</sup>. In view of the fact that rival factions have emerged, and both the factions are claiming to be the 'real political



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<sup>44</sup> *Subash Desai* Paragraph 119

party' it is imperative to *prima facie* determine when did the rival factions emerge. Thus, it is necessary to determine the relevant day on which rival factions emerged before further venturing into '*which of the faction was the real political party when rival factions emerged*'.

103. At the outset, I must set straight the point that the determination of the Speaker, exercising jurisdiction under the Tenth Schedule while deciding (*who the real political party is*), mandates only a preliminary inquiry which has to be done *prima facie* by taking into account materials officially before the Speaker as the Master of the Legislative Assembly. I shall consider the facts, relevant for this determination on what is before me as the Speaker of the Legislative Assembly.

104. As noted by the Hon'ble Supreme Court in *Subash Desai (Supra)*<sup>45</sup> on 21<sup>st</sup> June 2022 there was no material available before the then Deputy Speaker to infer the emergence of any rival factions. However, after taking on record the Resolution dated 21<sup>st</sup> June 2022 passed by the SLP (*disputed by the Respondents*), the very next day the then Deputy Speaker received a Resolution (*disputed by the Petitioner*) dated 21<sup>st</sup> June 2022 (*received by the then deputy speaker on 22<sup>nd</sup> June 2022*) contrary to the Resolution dated 21<sup>st</sup> June 2022. Thus, from this fact alone, it is evident that there emerged two factions of



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<sup>45</sup> Paragraphs 119, 122 & 123 of *Subash Desai*

Shiv Sena from 21<sup>st</sup> June 2022 itself but the same came to be officially on record of the office of the Speaker and/or the Legislature Secretariat on 22<sup>nd</sup> June 2022.

105. At this juncture, it is imperative to refer to Paragraph 119 of *Subash Desai (Supra)* where the Hon'ble Apex Court, while discussing the legality of the recognition of 'Leader' and the 'Whip' of Shiv Sena accorded by the Letter dated 03<sup>rd</sup> July 2022, held that the Speaker ought to have taken into consideration the 'split' that took place within the Shiv Sena which were discernible from two sets of resolutions, appointing two different 'leaders' and 'whips' placed on record by the Shiv Sena before the Legislature Secretariat. This paragraph (119) read with the Hon'ble Apex Court's findings recorded by the Hon'ble Apex Court in paragraph 157 of *Subash Desai (Supra)*, makes it clear that the law laid down by the Hon'ble Supreme Court is that 'in view of the deletion of 'Paragraph 03 of the Tenth Schedule', when rival factions emerge as a result of rift/split in a party, the Speaker has to necessarily find which faction is the real political party while recognising 'leader' and the 'whip' of the party.

106. Thus, in view of the facts recorded in the preceding paragraphs, and keeping in view the principles enumerated by the Hon'ble Supreme Court in *Subash Desai (Supra)* (as recorded in Paragraph 84 hereinabove), I have come to the



conclusion that the emergence of two factions of the Shiv Sena can be inferred from 21<sup>st</sup> June 2022 itself, and the same came to be a matter of official record of the office of the Speaker and/or the Legislature Secretariat on 22<sup>nd</sup> June 2022.

*Conclusions and findings on 'Real Political Party'*

107. Having decided the (i) relevant constitution of Shiv Sena, (ii) Leadership Structure, and (iii) the relevant point for the purpose of determining the *preliminary issue*, I have made the following analysis, observation, and determinations on the *preliminary issue* of 'which faction was the real political party when two factions emerged'. For the purpose of analysing, discussing, and determining this issue, the faction of the Petitioner is hereinafter referred to as the "UBT faction" and likewise the Respondents' faction is referred to as the "Shinde faction".

*The Applicability of the Test of Aims and Objectives*

108. It is to be noted that the 'UBT faction' have not based their claim of 'real political party' on the 'SS Constitution', i.e., the 'UBT faction have not pleaded that they are the faction who have followed the SS Constitution, and that the other faction have violated the *aims and objectives* of SS Constitution. However, the 'Shinde faction' have pleaded that the 'UBT





faction' by entering into a post-poll alliance with Political Parties who are ideologically opposed to the Shiv Sena, have violated the *aims and objectives* of the 'SS Constitution'.

109. 'Shinde faction' has led detailed evidence to demonstrate how Shri Eknath Shinde and other Respondents have always followed the party objectives and the principles on which the Shiv Sena Party was founded by *Late Shri. Balasaheb Thackeray*. While the Petitioner has not controverted the same, the 'UBT faction' has met with the said submission of the Shinde faction by arguing that *'if the said argument is accepted then, the legislators of a political party which enters into a post-poll alliance are not governed by the decisions of the political party; it will further have to be held then the Tenth Schedule is inapplicable to such legislators of a post-poll alliance; the said interpretation militates completely against the letter and spirit of the Tenth Schedule; legislators, willy-nilly have to accept the decision of the political party in the matter of post-poll alliances and a ground that there was a pre-poll alliance and some of the legislators want to align with the pre-poll alliance contrary to the wishes of the political party is not available under the Tenth Schedule of the Constitution'*<sup>46</sup>

110. While there is uncontroverted evidence in support of 'Shinde faction' adhering to the *'aims and objectives of the Shiv Sena'* party as per the SS constitution, I am afraid that the scope of



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<sup>46</sup> Paragraph 12 of Kamat's rejoinder submissions

my enquiry to look into the party constitution, does not permit me to look beyond what has been directed by the Hon'ble Supreme Court in *Subash Desai (Supra)*. The context in which the Hon'ble Supreme Court has made these observations, in *Subash Desai (Supra)*, that the Constitution of the Shiv Sena shall be considered while adjudicating the *preliminary issue* of 'real political party' needs to be considered. A careful reading of the observations at paragraph 168 of the judgment in *Subash Desai (Supra)* makes it clear that the Constitution of the party will only have to be looked into for the purpose of identifying the leadership structure of the party and nothing more. Further, it has to be borne in mind that this is a limited inquiry and not an enquiry under Paragraph 15 of the Symbols Order.

111. Thus, in view of the said fact and law, I find that in the facts of present cases, there need not be any determination on 'whether any of the faction have gone against the *'aims and objectives'* of the Constitution of the Shiv Sena. This cannot be the reason why the Shiv Sena Constitution assumes significance for the purpose of determining the *preliminary issue*. The reason why Shiv Sena Constitution assumes significance, is to analyse 'whether the question of 'which faction is the real political party' is discernible from the leadership structure identifiable from the said 'SS Constitution'.



Leadership structure as a criterion to determine who was the real political party.

112. As I have already held which is the relevant constitution and the leadership structure of the Shiv Sena, to be taken into account for deciding the preliminary issue, I now have to see whether the relevant leadership structure read with the SS Constitution provides answer to the question 'which faction is the real political party' and consequently determine the same.
113. 'UBT faction' made the following submissions in support of their contention that, as per the 2018 leadership structure 'UBT faction' have to be held as the real political party:
- (a) The Shiv Sena Party Constitution, whether it is the 1999 version, or the 2018 version, recognizes the Party President as the main figure in the leadership structure of the Party. The Party President is assisted by the Shiv Sena Leaders, who comprise the Rashtriya Karyakarini.<sup>47</sup>
  - (b) For the purposes of 'prima facie determination', it is submitted that the Shiv Sena political party at the relevant time in June-July 2022 was headed by Shri Uddhav Thackeray, the Party President. Given the role ascribed to the party president under the 1999 and the



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<sup>47</sup> Paragraph 75 of Kamat's Submission.

2018 Party Constitutions, it is the Party President who represented the will of the political party for the purposes of these proceedings.<sup>48</sup>

- (c) Even in the *Rashtriya Karyakarini*, the next most significant body in the organizational structure after the Party President, Shri Uddhav Thackeray enjoyed overwhelming majority and support at the relevant time, i.e., in June-July 2022.<sup>49</sup>
- (d) The overwhelming support enjoyed by Sh. Uddhav Thackeray amongst the members of the *Rashtriya Karyakarini* is evident from, (i) the affidavits dated 25.06.2022 executed by 9 out of 13 members of the *Rashtriya Karyakarini* in favour of Sh. Uddhav Thackeray, and (ii) the complete lack of any affidavits of support by members of the *Rashtriya Karyakarini* in favour of Sh. Eknath Shinde.<sup>50</sup>
- (e) **Subhash Desai (Supra)** when it makes a reference to the party constitution (*para 168 @Page 120, CCJ*), the same is for the purpose of identifying the structure of leadership of the party. The Constitution by itself does not and cannot identify the leaders who are holding the



<sup>48</sup> Paragraph 77 of Kamat's Submission

<sup>49</sup> Paragraph 79 of Kamat's Submission

<sup>50</sup> Paragraph 80 of Kamat's Submission

positions in that leadership structure at a particular point in time. Therefore, even if it is to be assumed that the Constitution of 2018 was not taken on record by the ECI, that by itself cannot nullify the leadership structure of Shiv Sena Political Party in 2018 that is available in the public domain.<sup>51</sup>

- (f) Organizational structure of the Shivsena Political Party, whether under the 1999 constitution, or under the 2018 constitution, is the same, i.e., it comprises of the Party President, *Rashtriya Karyakarini* and the *Pratinidhi Sabha*. Only the vernacular nomenclature given to the post of Party President is different, i.e., Shivsena Pramukh (1999) or Shivsena Paksha Pramukh (2013 and 2018).<sup>52</sup>
- (g) Leadership bodies namely the *Rashtriya Karyakarini* and the *Pratinidhi Sabha* exist in both the 1999 Constitution and the 2018 Constitution. As per Article XI (A) of both the Constitutions, the President of the Shiv Sena Political Party is elected by members of the *Pratinidhi Sabha*. The changes in the 2018 Constitution relate only to the strength and manner of selection to such posts. Therefore, even going by the 1999 Constitution, if the



<sup>51</sup> Paragraph 114 of Kamat's Submission

<sup>52</sup> Paragraph 115 of Kamat's Submission

*Rashtriya Karyakarini* leadership is seen, the Petitioner enjoys a clear majority.<sup>53</sup>

- (h) Even if it is to be assumed that the 2018 amendment is not to be taken into consideration, the post of the Party President is a statutory requirement under Section 29 of the Representation of the People Act, 1951 and exists in both the 1999 constitution and 2018 constitution of Shivsena. A bare perusal of Article X (1) would show that the manner of selection of the President in both the 1999 constitution and the 2018 constitution is same and merely the nomenclature is changed.<sup>54</sup> Therefore, the nomenclature whether the President is to be addressed as Pramukh or Paksha Pramukh is completely irrelevant. The fact that the post of President exists and the terms 'Pramukh' and 'Paksh Pramukh' are merely the titles assigned to the post of the President and the nature of duties and responsibilities are same in both the constitutions is by itself sufficient enough to show that Shri Uddhav Thackeray was the head of the party.<sup>55</sup>
- (i) Whilst the Petitioner has clearly established the *leadership* structure of the Shivsena Political Party which existed prior to the arising of the present dispute, the



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<sup>53</sup> Paragraph 118 of Kamat's Submission

<sup>54</sup> Paragraph 120 of Kamat's Submission

<sup>55</sup> Paragraph 121 of Kamat's submission

Respondents have not even attempted to demonstrate any alternative leadership structure which existed in terms of Section 29 A of the R.P Act.<sup>56</sup>

- (j) Section 29A (4) mandates that every application made for registration should specify *inter-alia*, the name of its President, Secretary, Treasurers, and other office bearers.
- (k) The political party is identified, and the actions of its office bearers/leadership structure is taken as the decision of as 'A' political party or 'B' political party. The decisions of a political party are synonymous with the decisions of leadership structure of the political party as communicated to the ECI.<sup>57</sup>

**114.** Per contra 'Shinde faction' have submitted that the leadership structure of 2018 cannot be taken into account for determining the *preliminary issue* as the same is not in conformity with the Constitution of the Shiv Sena and thus cannot be the basis for deciding the 'real political party'. To elucidate the same, 'Shinde faction' made the following submissions:

- (a) 2018 organizational/leadership structure includes members nominated/appointed by Shri. Uddhav Thackeray to the posts of Secretary, Samanvayak and



<sup>56</sup> Paragraph 131 of Kamar's Submission

<sup>57</sup> Paragraph 51 of Kamar's Submission

Sangathak and these posts do not find place in the Constitution.<sup>58</sup>

- (b) Letter dated 27.02.2018, reflects that a total of 33 Deputy Leaders were appointed (21 *by way of election and 12 appointed by the sole discretion of Shri. Uddhav Thackeray*). However, as per the Constitution only 21 posts existed for Deputy Leaders (17 *to be elected and 4 to be appointed*). Hence the additional number of positions identified as elected and/or (appointed at the sole discretion of Sh. Uddhav Thackeray) does not conform with the Constitution.<sup>59</sup>
- (c) 2018 organizational/leadership structure diverges from the leadership structure of the party as per the Constitution and hence the said leadership structure cannot be relied on to claim that the 'UBT faction' enjoyed the support of the organizational/leadership structure of the party.<sup>60</sup>
- (d) Table at paragraph 117 of the Written Submissions of the Respondents show how the 2018 organizational and/or



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<sup>58</sup> Paragraph 112 of Respondents' Written Submissions.

<sup>59</sup> Paragraph 113 of Respondents' Written Submissions.

<sup>60</sup> Paragraph 115 of Respondents' Written Submissions.



leadership structure is not in conformity with the Constitution.<sup>61</sup>

115. In view of the above recorded submissions of the parties, there emerges two further questions, (i) whether 2018 leadership structure is in conformity with the Constitution of the Shiv Sena, and (ii) whether 'will of the *Pakshapramukh* and/or 'majority' leaders' in the 2018 leadership structure could be said to be synonymous with the 'will of the political party'.

*Whether 2018 leadership structure is in conformity with the constitution of the Shiv Sena?*

116. As there are contrasting submissions on this question it is necessary to peruse the 'SS Constitution' and the '2018 Leadership Structure' and then record a finding as to whether the 2018 Leadership structure is in conformity with the Constitution of the Shiv Sena. Thus, I have taken a comparative look at the '2018 leadership structure' and the 'SS Constitution' and have arrived at the following observations and conclusions.

(a) 2018 Leadership Structure mentions "Shiv Sena *Pakshapramukh* (president)" as the highest office of the SSPP. However, in the 'SS Constitution', the highest office of the SSPP is "*Shiv Sena Pramukh*" but the said



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<sup>61</sup> Paragraph 117 of Respondents' Written Submissions.

constitution distinguishes highest office and the highest authority and provides that the '*Rashtriya Karyakarini*' is the highest authority whose decisions shall be final.

- (b) 'SS Constitution' provides that the members of the *Rashtriya Karyakarini* shall be called as Shiv Sena Leaders and provides for a total number 19 members, out of which 14 are to be elected by the '*Pratinidhi Sabha*' and the rest of the 5 members are to be appointed by 'Shiv Sena Pramukh'. However, the 2018 Leadership Structure envisages only 13 members in the '*Rashtriya Karyakarini*', out of which 9 are to be elected and the remaining 4 are to be appointed.
- (c) 'SS Constitution' provides for a total number 21 deputy leaders, out of which 17 are to be elected by the '*Pratinidhi Sabha*' and the rest of the 4 members are to be appointed by 'Shiv Sena Pramukh'. However, the 2018 Leadership Structure envisages 33 deputy leaders, out of which 21 are to be elected and the remaining 12 are to be appointed.
- (d) 2018 Leadership structure provides for three categories of office bearers, *vis-à-vis* Secretary, *Samanvayak* and *Sanghatak*. However, the Constitution of the Shiv Sena provides for three categories office bearers *vis-à-vis*



President, *Sarchitnis* (General Secretary), *Koshadhyaksha* (treasurer).

117. From the observations recorded in the preceding paragraph, it is evident that the 2018 Leadership structure is not at all in conformity with the Constitution of the Shiv Sena. In view of this finding alone, it could very well be concluded that the 2018 Leadership Structure, which is not in conformity with the Constitution of the Shiv Sena, cannot be taken as the yardstick to determine 'which faction was the real political party at the relevant point of time'. In view of the same, I have come to the conclusion that the '2018 leadership structure' read with the 'SS Constitution' does not provide a reliable outcome and/or answer to the question '*which faction is the real political party*' and hence cannot be relied upon to determine the said *preliminary issue*.

118. Nevertheless, I am inclined to look into the second question, recorded in Paragraph 115 hereinabove, (i.e., whether 'will of the *Pakshapramukh* and/or 'majority' leaders' in the 2018 leadership structure could be said to be synonymous with the 'will of the political party'), so as to not leave any stone unturned in arriving at a decision.

119. The determination of this question arises out of the alternate submission made by the 'UBT faction' that the '2018



Leadership Structure' has to be taken *ex-facie* and the determination of 'which faction was the real political party' has to be solely based on the said leadership structure without a comparison of the said structure with the leadership structure provided for in the Constitution of the Shiv Sena. The said proposition would run counter to the principles laid down by the Hon'ble Apex Court in *Subash Desai (Supra)* where it was specifically provided that the leadership structure, which has to be taken into consideration while determining the real political party, has to be identifiable by the relevant constitution.<sup>62</sup> Thus, although, in the light of my findings on the preceding question, this aspect need not be looked into. However, I intend to look into the said aspect any which way considering the gravity and importance of the dispute. Hence, following are my observations, findings, and conclusion on the said aspect.

*Whether decision of the 'Pakshapramukh' is synonymous with the 'will of the political party'*

120. 'UBT faction' has submitted that the *decision of the 'Pakshapramukh' is synonymous with the 'will of the political party'* and thus if there is a *rift* in the leadership structure the decision of the 'Pakshapramukh' constitutes the *'will of the political party'*. This proposition is devoid of merit, and I do not

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<sup>62</sup> Paragraph 167 & 168 of the CBJ



find any substance to allow the same. The reasons for the same are recorded hereinbelow:

- (a) This proposition, perhaps, would have been a valid point if the party president was the 'sole repository' of 'decision making' with respect to the policy and administration of the party. For analysing the said submission, a perusal of the 'SS Constitution' was made. The 'SS Constitution' provides that "*Rashtriya Karyakarini shall be the highest authority of the party, and its decisions in all matters concerning the party policy and party administration shall be final*". It is to be noted that the *Pakshapramukh* is only a presiding member of the said highest authority in the party and, in no way, is the 'sole repository' of 'decision making' in the party. Thus, in view of the same, the submission that the decision and/or the 'will of the *Pakshapramukh* is synonymous with the will of the political party cannot be accepted.
- (b) It would also be appropriate to note that the 'SS Constitution' does not even have a post called *Pakshapramukh*. However, it was argued by the 'UBT faction' that the nomenclature differences in the '2018 Leadership Structure' and the SS Constitution is not a relevant factor for the purpose of deciding the preliminary issue. Even though, I have held in



Paragraph 117 that “2018 Leadership structure is not at all in conformity with the SS Constitution”, I shall consider this submission.

- (c) The Constitution of the Shiv Sena provides for Shiv Sena Pramukh. The submission of the Petitioner that the *Shiv Sena Pramukh* mentioned in the SS Constitution is the same post of *Shiv Sena Pakshapramukh* termed in the 2018 leadership structure. By relying on the powers of *Shiv Sena Pramukh* it was argued by the ‘UBT faction’ that he is the authority under the party constitution vested with the power to remove any members of the party. Thus, it was further argued that an authority who is vested with such a power of removal reflects the will of the political party with respect to removal of members for anti-party activities. However, a complete reading of the said provision in the party constitution reveals that the said submission is factually wrong. The said provision, in relation to the ‘powers of the *Shiv Sena Pramukh*’ clearly provides that such a power is not absolute, and it has to be exercised in consultation with the *Rashtriya Karyakarini*. Further, it has to be noted that, such a power is only available to the *Shiv Sena Pramukh* for the purpose of removal of members mentioned in Article VIII (Schedule B) of the said constitution. The said



schedule does not deal with 'leaders' of the party. Leaders of the party is given under '(Schedule A)' of the said Article. Thus, the *Shiv Sena Pramukh* does not have any power to remove any leaders of the party. Thus, the submission of the Petitioner that Shri Uddhav Thackeray *vide* letter dated 30.6.2022 had removed Shri Eknath Shinde from the post of Shiv Sena Leader cannot be accepted as such powers are not vested with the party president. Hence, on this ground also, the submission that the decision and/or the 'will of the *Pakshapramukh* is synonymous with the will of the political party cannot be accepted.

- (d) If this proposition is accepted then in a situation where the 'Party President', who is also a legislator, itself defects then he could simply escape the wrath of the Tenth Schedule by pleading that 'his decision is the will of the party'. Further, if this proposition is to be accepted it would mean that no member can ever voice concerns against the 'Party President' and the party president might, possibly, be able to seek disqualification against any member who questions his credibility. This would run contrary to the concept of *intra-party dissent*. In view of the clear and unequivocal findings of the Hon'ble Supreme Court at Para 183 to 190 of *Subhash Desai*, I will



be falling foul of the Judgment of the Hon'ble Supreme Court in *Kihoto Hollohan*, wherein the constitutional validity of the Tenth Schedule was itself upheld on the ground that it is not an anti-dissent law, if this proposition is accepted.

*Whether will of the 'majority' leaders in the 2018 leadership structure is synonymous with the 'will of the political party'*

121. I shall now proceed to consider whether the will of the majority leaders in the '2018 leadership structure' is synonymous with the 'will of the political party'. An alternate submission was made that even if the *Pakshapramukh* is not accepted as the repository of the 'will of the political party' *'the decision of the leadership structure has to be construed as synonymous with the 'will of the political party'*. This proposition is also devoid of merit, and I do not find any substance in it for the following reasons:

- (a) In a circumstance where there is no dispute amongst the leaders, identifiable by the constitution of a political party, this proposition would have held water. However, the factual matrix of the present matter is different. This is a matter where there is a dispute within the leadership structure itself. It is to be noted that in the present matter rival factions have emerged in the legislature party, political party and thus inevitably





amongst leaders of the party as well. Thus, it would not be wise to apply this proposition in the present matter.

The existence of split/rift in the leadership structure is admitted by the Petitioner and/or the 'UBT faction' as can be inferred from the Petitioner's *Affidavit in lieu of Examination in Chief of PW-1 (Petitioner himself)* that the leader of the 'UBT faction' did not have the support of all the members of the 2018 leadership structure when the rival factions emerged.

Thus, the submission that *'the decision of the leadership structure has to be construed as synonymous with the 'will of the political party'* could have, perhaps, be applied in a situation where there is a dispute between some members of the party and the (elected) leadership. In such a case the leadership of the party could have, possibly, taken the stand that their decision would have to be taken as the 'decision and will of the political party' until they are so removed from the leadership structure by a mechanism recognised by the constitution of the said political party. However, as I have noted earlier, in the present matter rival claims have emerged within the leadership structure about the leadership itself. In such a situation one leader's contention that his



will is the 'will of the political party' would be a contradiction in terms.

- (b) Thus, when there is a vertical rift in the party and two factions (*within the said leadership structure*), emerge as a result of the said rift, leaders of either faction (*both Shri. Uddhav Thackeray and Shri. Eknath Shinde*) could equally claim to represent the will of the political party. In that case it would not be appropriate to take their decisions as the "*decision that carries the will and wish of the political party*" when the question of 'which faction is the political party' is being considered.

122. There, possibly, lies one more aspect that could be considered.

"Does the stand/decision of the majority number of leaders (*within the leadership structure identifiable and appointed according to the constitution of the political party*) could be construed as the 'will and desire' of the political party, in the event there is a dispute within the leadership structure".

123. For the purpose of answering this question one must look into the constitution of the political party. In an event where the party constitution provides for a mechanism to resolve a conflict of decision within the leadership structure then in that case it would have been a guiding factor. However, if the party constitution does not provide for such a mechanism,



then in that case it would not be appropriate to say that the decision of the majority leaders would have to be accepted as the one which conveys the 'will of the political party'.

124. This aspect need not be further considered in view of the fact that in any case, 'UBT faction' has not placed any material on record to even suggest that any meeting of the '*Rashtriya Karyakarini*' was called for where any decision in relation to the 'real political party' was resolved so as to identify the 'leader' and/or the whip who carried the 'will of the political party'. Thus, in the absence of any such material, indicating any 'majority decision' of the *rashtriya karyakarini* in relation to the 'real political party' identifying the 'leader' and/or the whip who carried the 'will of the political party', would be an impossible ask. Any conclusions reached would be without basis in law and evidence of fact. The submission that the 'UBT faction shall be taken as the real political party' is entirely based on a conjecture that '*if there were a decision taken in relation to the political party by the Rashtriya Karyakarini, then UBT faction would have had the majority*'.

125. At this juncture, the Petitioner's claim about a meeting purportedly held on 25<sup>th</sup> June 2022 has to be dealt with. It is the Petitioner's case that a *Rashtriya Karyakarini* meeting was held on 25<sup>th</sup> June 2022 and certain resolutions were passed. In support of this case Petitioner had produced certain



resolutions of 25<sup>th</sup> June 2022. Those documents are disputed by the Respondents. Mr. Jethmalani, learned Counsel for Respondents, objected to the said documents being considered on the ground that they were forged and fabricated and demonstrated this before me by showing two separate documents, one annexed<sup>63</sup> by the Petitioner Shri Sunil Prabhu to his *Affidavit in lieu of Examination in Chief* and the other set of the same documents which are annexed to the Supreme Court Convenience Compilation Volume-II<sup>64</sup>. In the first set of documents, annexed to the *Affidavit in lieu of Examination in Chief*, termed as Minutes of the meeting of Rashtriya Karyakarini are purportedly 7 resolutions passed in the said meeting. In none of the resolutions, there is any signature of any person whose names are shown on the said document. Only on Page 105 (of Shri Sunil Prabhu's *Affidavit In lieu of Examination in Chief*) there is a sole signature of Shri Vinayak Raut (*who is shown as Shiv Sena Secretary*). The perusal of the said document shows that the meeting was termed as "*Rashtriya Karyakarini*". In the second set of documents, which are annexed to the Supreme Court Convenience Compilation Volume-II, the resolutions are shown on different pages, and they are not part of any minutes which was annexed to the *Affidavit In lieu of Examination in Chief* of Shri Sunil Prabhu. These resolutions are shown on the letterhead of Shiv Sena

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<sup>63</sup> Page No. 101 of the Petitioner's *Affidavit in lieu of Examination in Chief*

<sup>64</sup> Page No. 247 of the SC Compilation Volume-II



*"Rashtriya Karyakarini Baithak (Pratinidhi Sabha)*. Petitioner relied on these documents to show that seven resolutions have been passed but in none of the documents there is even a single signature save and except for signatures of two persons. The names mentioned as Proposer and Seconders are not even members of *Rashtriya Karyakarini*, like Shri Rahul Shewale, who is not a member of *Rashtriya Karyakarini*, who has stepped in as a witness and led evidence that there was no such meeting. The same is the case with Shri Vinayak Raut and Shri Arvind Sawant. They are also not members of the said *Rashtriya Karyakarini*. The petitioner had claimed that the said meeting was held on 25.6.2022 at Sena Bhavan whereas, Shri Uddhav Thackeray claimed that the said meeting was held through video conference. This has been stated by Uddhav Thackeray in his Submissions before the Election Commission filed on 9.1.2023. This itself casts doubt on the authenticity of the documents and holding of any such meeting of either *Rashtriya Karyakarini* or *Pratinidhi Sabha*. The Petitioner himself is not sure whether it was *Rashtriya Karyakarini* or *Pratinidhi Sabha*. Thus, in view of the above the said document cannot be permitted to be relied on.

126. Petitioner suggested that a look into how the Shiv Sena settled conflict of decisions within the leadership structure in the past might shed some light into this. However, in the present



matter, no such materials are placed before me, to even suggest such instances which happened in the past, where the majority decision within the leadership structure is taken as the 'will of the political party'. It is to be also noted that the Petitioner has neither pleaded nor provided any material to show that historically the decision of the majority within the leadership structure is taken to be the final decision of the political party whenever there was a conflict of decisions within the leadership structure. Thus, for this reason also, it would not be appropriate and correct to accept the proposition that the "decision of the majority leaders within the leadership structure would have to be accepted as the one which conveys the will of the political party".

127. As a passing note, I must also add that the majority rule, possibly, could have been applied in a normal situation where there is 'dissent' in respect of some policy and/or administrative decisions of the party, however such a simple rule/test shall not be applied to determine an existential question in relation to the Political Party, such as in the present matter where 'which faction is the real political party' is required to be determined.

128. Thus, in view of the discussions recorded hereinabove, I am not inclined to accept the submission of the 'UBT faction' that



*“will of the ‘majority’ leaders in the 2018 leadership structure is synonymous with the will of the political party”.*

129. Thus, from Paragraphs 112 to 128, I have dealt with whether the relevant leadership structure read with the ‘SS Constitution’ provides answer to the question ‘which faction is the real political party’. In view of the same I record my conclusions and findings thereon as under:

- (a) 2018 Leadership structure is not at all in conformity with the Constitution of the Shiv Sena and thus does not provide a reliable outcome and/or answer to the question ‘*which faction is the real political party*’ and hence cannot be relied upon to determine the *preliminary issue*.
- (b) Decision of the ‘*Pakshapramukh*’ is not synonymous with the ‘will of the political party’ and thus if there is a rift in the leadership structure the decision of the ‘*Pakshapramukh*’ cannot be taken as the ‘will of the political party’.
- (c) When there is a vertical rift in the horizontal leadership hierarchy of the political party and both the factions within the said leadership structure, emerged as a result, claim to represent the will of the political party, it would not be appropriate to apply the test of which of the said



faction's "decision carries the will and wish of the political party".

(d) In the case of Shiv Sena Political Party "will of the 'majority' leaders in the 2018 leadership structure" cannot be said to be synonymous with the will of the political party.

130. In view of the finding recorded in the preceding paragraph, I hold that the 2018 leadership structure read with the 'SS Constitution' DOES NOT provide any reliable answer to the question '*which faction is the real political party*' and consequently the '2018 leadership structure' cannot be the yardstick to determine which faction is the real political party.

131. After having come to the conclusion that neither the *(i) test of constitution* nor the *(ii) the 2018 leadership structure* can be made yardsticks to determine *which faction is the real political party*, I have to now proceed to determine 'whether legislative majority can provide answer to the question 'which faction is the real political party' and consequently determine which faction is the real political party accordingly'.

*Legislative majority considered.*

132. As recorded earlier in Paragraphs 84 herein, the Hon'ble Supreme Court in *Subash Desai (Supra)*, has held that the





question of 'who the real political party is', has to be considered and determined after giving due weightage to (i) the 'SS Constitution' (ii) the leadership structure of the party and (iii) legislative majority, if two or factions claim to be the real party. Having arrived at the conclusion that '2018 leadership structure read with the relevant Constitution of the Shiv Sena DOES NOT provide a reliable outcome to settle the issue of 'which faction is the real political party', I now turn to the test or mechanism that exists based on the *legislative majority*. It is a well settled position of law that *where the question arises as to which group is the party, strength of each group becomes an important and relevant factor*<sup>65</sup>. It is obvious why the legislative majority becomes a relevant criterion to be taken into account to decide which faction is the real political party.

**133.** For the purpose of determining which faction enjoyed the legislative majority, and in considering that the present preliminary issue has to be determined *prima-facie*, I have to only look into whether 'majority' in the legislature party can be discerned or inferred from the office records of the Legislature Secretariat. No other documents can be taken into account at this point in time, and I have to only consider documents or materials which were on record of the Legislature Secretariat which were put up before the Speaker



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<sup>65</sup> Saqiq Ali & Anr Vs. Election Commission of India (1972) 4 SCC 664

recognising the 'whip and the 'leader', since the entire objective of determining 'which faction is the real political party' is to determine who was the duly authorised whip and/or leader of the legislature party who carried the will of the political party.

**134.** Further, it is to be also borne in mind that the 'legislative majority, relevant for the purpose of determining the *preliminary issue* is the legislative majority which existed *at the relevant point in time when rival factions emerged*. Thus, the legislative majority which existed, and/or which is discernible from (21<sup>st</sup> June 2022) and (22<sup>nd</sup> June 2022) has to be seen.

**135.** In line with the analysis recorded in the earlier, it is noted that there exist only three documents on the record of the legislature secretariat, i.e., (i) 'UBT faction' Resolution dated 21<sup>st</sup> June 2022, (ii) 'Shinde faction' Resolution dated 21<sup>st</sup> June 2022 (*received by the legislature secretariat on 22<sup>nd</sup> June 2022*) and (iii) 'Shinde faction' Resolution dated 23<sup>rd</sup> June 2022 which could shed light on the 'legislative majority' which existed on the relevant point in time.

**136.** These Resolutions were passed by both 'UBT faction' and the 'Shinde faction' respectively, whereby the status of the 'leader' and the 'whip' were sought to be changed. While each faction has taken its separate resolutions, the support garnered for the



said resolutions, would indicate the respective strength of each faction. Thus, the Resolution with the larger numerical strength would indicate that the Resolution was backed by the legislative majority, which in turn could be a determinative factor in deciding 'which faction was the political party at the relevant point of time'. Consequently, the *preliminary issue* can be answered accordingly. It is made clear that, these resolutions are only considered (at this juncture) to see the numerical strength and I am in no way dealing with other issues which arise out of the said document as raised by the parties.

*'UBT faction' Resolution dated 21<sup>st</sup> June 2022<sup>66</sup>*

137. The Resolution dated 21<sup>st</sup> June 2022, passed by the 'UBT faction', merely states that a meeting of the SSLP was held on 21<sup>st</sup> June 2022 and in the said meeting certain resolutions were passed. The said document shows Shri. Ravindra Waikar as the 'proposer' and (i) Shri. Uday Samant, (ii) Shri Dada Bhuse and Shri. Sanjay Rathod as the seconders of the said Resolution.

138. Thus, it is not clear as to how many legislators supported the said resolution on the said meeting. Petitioner relied upon the 'Attendance Sheet' of the 21<sup>st</sup> of June 2022 to claim that all those



<sup>66</sup> Annexure-P3 (@Page 16) of the Disqualification Petitions No. 01 to 16

MLAs who have signed the said attendance sheet had supported the said resolution. Thus, based on the aforementioned document, 'UBT faction' claimed the support of 24 MLAs of Shiv Sena. However, out of these 24 MLAs, four MLAs, namely Shri Yogesh Kadam, Shri Uday Samant, Shri. Deepak Kesarkar and Shri Dilip Lande have, in their *Examination in Chief*, denied their signatures on the said attendance sheet and further stated that no resolutions were passed on 21<sup>st</sup> June 2022. Further, a comparison of the Original of the said Attendance Sheet, *produced along with the Affidavit in lieu of Examination in Chief*, and a copy of the attendance sheet, *produced and verified as a true copy along with the petition*, reveals that they do not match and there are glaring discrepancies.

139. The copy claimed to be the original of the said attendance sheet has a handwritten date of '21<sup>st</sup> June 2022' whereas the copy, verified as the true copy of the original, produced along with the Petition does not have the date. Further, it is to be also noted that Shri. Sunil Prabhu in his cross examinations stated that the 'document relied as the 'attendance sheet reflecting the support to the 'UBT Resolution dated 21<sup>st</sup> June 2022' is in fact a register of MLAs to whom the Whip of 21<sup>st</sup> of June 2022 was served and received<sup>67</sup>.



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<sup>67</sup> Answer to Question No. 86, given by the Petitioner Shri. Sunil Prabhu (PW-1).

140. So, a conjoint reading of the facts that (i) some of the MLAs, who purportedly signed the said resolution, denied their signatures, (ii) there are glaring discrepancies in the said resolution and (iii) the statement of Shri. Sunil Prabhu that document relied as the 'Attendance sheet of MLAs present when UBT Resolution dated 21<sup>st</sup> June 2022 was passed' is in fact a register of MLAs to whom the Whip of the 21<sup>st</sup> of June 2022 was served and received, makes the said document unreliable for determining the strength of 'UBT faction' at the relevant point of time.

141. However, at this juncture, since the resolutions are looked into only for the purpose of determining the numerical strength of support each faction had on 21<sup>st</sup> June 2022, the resolutions is looked at only for that limited purpose. Thus, a perusal of the 'UBT faction resolution dated 21<sup>st</sup> June 2022' reveals that 'UBT faction' had a support of 4 legislators. The submission that 'UBT resolution' had the support of 24 legislators cannot be accepted for the simple reason that, mere presence in the said meeting of an MLA cannot be taken to mean that all those present supported the said resolution. Thus, even if we are to ignore the discrepancies in the resolution, only for the purpose of determining the numerical strength, at the most 'UBT faction' had the support of 4 legislators and the attendance



sheet cannot be taken as a material which proves the support to the said resolution.

*'Shinde faction' Resolution dated 21<sup>st</sup> June 2022*

142. The Resolution dated 21<sup>st</sup> June 2022, passed by the 'Shinde faction', was supported by 31 MLAs of Shiv Sena. However, it is pertinent to note that there exists a discrepancy in the 'Shinde Resolution dated 21<sup>st</sup> June 2022' as well. However, at this juncture, since the resolutions are looked into only for the purpose of determining the numerical strength of support each faction had on 21<sup>st</sup> June 2022, the resolutions is looked at only for that limited purpose. Thus, a perusal of the 'Sinde faction resolution dated 21<sup>st</sup> June 2022' reveals that 'Shinde faction' had a support of 31 legislators.

*'Shinde faction' Resolution dated 23<sup>rd</sup> June 2022*

143. Even though parties have not produced it, there is one more Resolution of the 'Shinde faction' which is on the record of the Legislature Secretariat. This is the Resolution dated 23<sup>rd</sup> June 2022 received by the legislature secretariat on 24<sup>th</sup> June 2023. The Resolution dated 23<sup>rd</sup> June 2022, passed by the 'Shinde faction', was supported by 37 MLAs of Shiv Sena, where 34 MLAs out of the said 37 MLAs reaffirmed the resolution dated 21<sup>st</sup> June 2022 passed by the 'Shinde faction' and further records that this Resolution was passed in view of the subsequent additional strength garnered by the 'Shinde



faction'. Thus, from this document it can very well be inferred that 34 MLAs have supported the 'Shinde Resolution dated 21<sup>st</sup> June 2022' whereby Shri. Eknath Shinde was re-affirmed as the leader of SSLP and Shri. Bharat Gogawale was appointed as the 'Whip' of the party. This is an admitted position and the fact that the 'UBT faction' has filed petitions against them under the Tenth Schedule, is an express admission of the strength of 'Shinde faction'.

**144.** In view of the above observations and findings I hold as follows:

- (a) 'Which faction is the real political party' is discernible from the Legislative majority which existed when the rival factions emerged.
- (b) Legislative majority, which existed when the rival factions emerged can be discerned and/or inferred from (i) the 'Shinde faction Resolutions dated 21<sup>st</sup> June 2022 & 23<sup>rd</sup> June 2022' available on record of the Legislature Secretariat, and the (ii) admitted position which can be inferred from the initiation of Petitions against 38 legislators of 'Shinde faction' by the 'UBT faction'.
- (c) 'Shinde faction' had an overwhelming majority of 37 out of 55 MLAs when the rival factions emerged.



145. From my analysis, observations, conclusions, and findings recorded in the Paragraphs 82 to 144 hereinabove, I hold that 'Shinde faction' was the 'real Shiv Sena Political Party' when the rival factions emerged on 21<sup>st</sup> June 2022.

### **B. Duly authorised Leader and the Whip**

146. The Hon'ble Supreme Court has pointed out in clear terms that it is necessary for me to determine the question as to who the authorized Leader of the Shiv Sena is, and who is its authorized Whip, and that I should do so by considering the matter from the point of view of their appointment by the political party, and not the legislature party. In *Subash Desai (Supra)*, and I quote the relevant portion, the Hon'ble Supreme Court has held that the concepts of 'political party' and 'legislature party' are distinct concepts and the concept of 'political party' cannot be conflated with the 'legislature party'. In this regard it has been held as under:

105. 'Political party' and 'legislature party' cannot be conflated. The contention of the respondents that political party and legislature party is inextricably intertwined is erroneous for the following reasons:

- (a) Parliament in its constituent capacity was conscious of the necessity of not allowing anti-defection laws





to stifle intra-party dissent and the freedom of expression of legislators. It was with this objective that the defences of merger and split (which was later omitted) were introduced. The Tenth Schedule confers legitimacy to the actions of the legislators which would otherwise lead to disqualification if a substantial number of legislators (two-third in the case of a merger, and one-third in the case of the erstwhile provision for a split) disagree with the political party. The Tenth Schedule recognizes the independent existence of the legislature party to the limited extent of presenting a defence to the actions of the legislators which would otherwise have amounted to defection; and

- (b) Section 29A of the Representation of the People Act 1951 requires an association of individuals calling itself a political party to be registered with the ECI. The party need not have returned candidates to the assembly to be registered as a political party. Under the Symbols Order, a political party receives recognition as a State Party or a National Party based on the total number of candidates returned to the assembly by the political party, and/or the total percentage of votes secured in the election. The



purpose of the requirement under the Symbols Order is to identify whether the political party has a substantial presence in the electoral fray to freeze an electoral symbol for that party. The Symbols Order does not refer to an association of legislators de hors the political party like the Tenth Schedule. It recognises a 'legislator' and a 'political party.' Thus, the reference to provisions of the Symbols Order to argue that the concepts of political party and legislature party are intertwined does not hold merit because the concept of legislature party is not recognized by the Symbols Order."

147. The Hon'ble Supreme Court further held, and I quote from their judgment below, that the direction to vote or abstain from voting must be issued by the Political Party or by any person or authority authorized by it. It was held that the Tenth Schedule stipulated in unequivocal terms that the direction must come from the political party and not the legislature party:

"109. On a literal interpretation of the provisions of the Tenth Schedule, the 1986 Rules and the Act of 1956, the direction to vote or abstain from voting arises from the political party and not the legislature party for the following reasons:



- (a) Paragraph 2(1)(b) of the Tenth Schedule provides that the direction to vote or abstain from voting must be issued by the political party or by "any person or authority authorized by it," with the word 'it' referring to the political party. The provision states that prior permission must have been received from the political party if the member wants to vote contrary to the direction issued, and the political party must condone such action within fifteen days. The provisions of the Tenth Schedule stipulate in unequivocal terms that the direction must come from the political party and not the legislature party. The distinction between political party and legislature party is made in the definition clause in Paragraph 1. There are no two ways about it. The Tenth Schedule would become unworkable if the term 'political party' is read as the 'legislature party.' A clear demarcation is made between political party and legislature party for the purpose of a merger under Paragraph 4, which stipulates that two-thirds of the members of the legislature party must



have agreed to a merger of the original political party before such a merger can be deemed to have taken place. To read the term 'political party' as 'legislature party' would be contrary to the plain language of the Tenth Schedule.

(b) It is an accepted position that the Whip communicates the directions of the party to its members. The phrase 'Whip' is neither used in the Tenth Schedule nor in the 1986 Rules. The phrase finds a mention in the Act of 1956 as one of the offices that would not be covered within the meaning of 'office of profit.' The explanation to Clause 23 of Schedule I in the Act of 1956 states that the Chief Whip is declared by the party forming the Government. The reference to 'party' in the explanation clause means political party and not legislature party because the term 'party' is used to depict political party in common parlance; and

(c) The respondents urge that the Whip is chosen by the legislature party because Rule 3(1)(a) of the 1986 Rules provides that the Leader shall inform the Speaker of the names and designations of the members who have been



authorized by it for communicating with the Speaker for the purposes of these rules. This argument is erroneous. The phrase 'any other member who has been authorized to communicate with the Speaker' in Rule 3(1)(a) must be read with the definition of 'Leader' under Rule 2(f), which includes such other member authorized to act in the absence of the Leader or discharge the functions of the Leader for the purpose of the Rules. When read together, it is evident that Rule 3(1)(a) refers to the furnishing of information about members who have been authorized to act as the Leader in the absence of the Leader themselves. The Whip interacts with the members of the legislature party to communicate the direction(s) of the political party. Rule 3(5) which prescribes that the Leader has to inform the Speaker if the political party has condoned the prohibitory actions of the members of the legislature party clearly establishes that it is only the Leader who communicates with the Speaker for the purposes of the 1986 Rules. This is all the more evident since Rule 3(5) requires the Leader to inform the Speaker in a



situation where the Leader votes or abstains from voting contrary to the direction of the political party. Under the 1986 Rules, the Whip is not the designated authority to file disqualification petitions. Rule 6 provides that a petition for disqualification can be filed by any member of the Maharashtra Legislative Assembly. The argument of the respondents that the legislature party appoints the Whip fails, so far as it is based on the provisions of the 1986 Rules discussed in this paragraph.”

“110. In *Mayawati (supra)*, the appellant issued a direction to all the MLAs of the BSP directing them to vote against the motion of no confidence moved by the BJP. Twelve MLAs belonging to the BSP voted in favour of the no confidence motion. The appellant filed petitions for disqualification against these twelve MLAs for the violation of Paragraphs 2(1)(a) and 2(1)(b). The Speaker dismissed the disqualification petitions. One of the findings of the Speaker was that it was not proved that the appellant was authorized to issue the direction on behalf of the political party. The order of the Speaker was challenged before this Court. It was submitted that



'political party' in Paragraph 2(1)(b) must be read as 'political party in the House', meaning the legislature party. Srinivasan, J. in his separate opinion rejected this argument and upheld the order of the Speaker by observing that there was no material to indicate that the appellant was authorized by the BSP to issue the direction. In this context, Srinivasan, J. held that 'political party' cannot be read as 'legislature party' for the following reasons:

- (a) The phrase 'political party' in Paragraph 2(1)(b) cannot be interpreted to mean legislative party while the same phrase in Paragraph 2(1)(a) retains its original meaning.
- (b) Such an interpretation would render explanation(a) to Paragraph 2(1) otiose because a legislature party cannot set up a person as a candidate for election.
- (c) Disqualification from membership of the assembly is a serious consequence. Such a consequence can only ensue from voting contrary to the direction of the Political Party; and



(d) In *Kihoto Hollohan (Supra)*, it was held that to balance the competing considerations of the anti-defection law and intra-party dissent, a direction to vote (or abstain from voting) can only be given if the vote would alter the status of the government formed or if it is on a policy on which the political party that set up the candidate went to polls on. Only the political party and not the legislature party can issue directions concerning issues of this nature.

111. Hence, the plain meaning of the provisions of the Tenth Schedule, 1986 Rules, and Act of 1956 indicate that the Whip and the Leader must be appointed by the political party.

112. The Tenth Schedule was introduced to thwart the growing tendency of legislators to shift allegiance to another political party after being elected on the ticket of a certain political party. The defection of MLAs would alter the composition of the House, and in most cases would lead to the toppling of the Government. Moral and democratic principles are compromised when a legislator shifts allegiance after the electorate votes for that legislator on the belief that they represent the ideology of a certain political





party. The Tenth Schedule was introduced, as the Statement of Objects and Reasons of the Constitution (Fifty Second Amendment) Bill 1985 states, to combat the evil of political defections which was “likely to undermine the very foundations of our democracy and the principles which sustain it.”<sup>68</sup> In *Kihoto Hollohan (supra)*, *SR Bommai*, and *Kuldip Nayar v. Union of India*<sup>69</sup> this Court recognized that political parties are central to the Indian democratic set-up, and that the Tenth Schedule seeks to curb defections from political parties. When the anti-defection law seeks to curb defections from a political party, it is only a logical corollary to recognize that the power to appoint a Whip vest with the political party.

113. To hold that it is the legislature party which appoints the Whip would be to sever the figurative umbilical cord which connects a member of the House to the political party. It would mean that legislators could rely on the political party for the purpose of setting them up for election, that their campaign would be based on the strengths (and weaknesses) of the political party and its promises and policies, that they could appeal to the voters on



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<sup>68</sup> Statement of Objects and Reasons appended to the Constitution (Fifty-second Amendment) Bill, 1985 (Bill No. 22 of 1985) which was enacted as the Constitution (Fifty-second Amendment) Act, 1985

<sup>69</sup> (2006) 7 SCC 1

the basis of their affiliation with the party, but that they can later disconnect themselves entirely from that very party and be able to function as a group of MLAs which no longer owes even a hint of allegiance to the political party. This is not the system of governance that is envisaged by the Constitution. In fact, the Tenth Schedule guards against precisely this outcome.

114. That a Whip be appointed by the political party is crucial for the sustenance of the Tenth Schedule. The entire structure of the Tenth Schedule which is built on political parties would crumble if this requirement were not complied with. It would render the provisions of the Tenth Schedule otiose and have wider ramifications for the democratic fabric of this country. Thus, the Courts cannot be excluded by Article 212 from inquiring into the validity of the action of the Speaker recognizing the Whip."

148. Further, while discussing the legality of the recognition of 'Leader' and the 'Whip' of Shiv Sena accorded by the Letter dated 03<sup>rd</sup> July 2022, the Hon'ble Supreme Court held in



Paragraph 119 of *Subash Desai (Supra)*<sup>70</sup>, that the Speaker ought to have taken into consideration the 'split' that took place within the Shiv Sena which were discernible from two sets of resolutions placed on record by the Shiv Sena before the Legislature Secretariat appointing two different Leaders and Whips. Thus, what emerges from the aforementioned paragraph of *Subash Desai (119)* read with paragraph 157 of *Subash Desai (Supra)* is that in case rival factions have emerged and rival claims for recognition of the Leader and the Whip are raised, the Speaker would have to satisfy himself that the said appointment were done by the 'real political party' and in accordance with law, and not arbitrarily. But it is not enough to establish that the appointment was done by the real political party, it must also be seen if the appointment reflected the will of the real political party. The argument that it has always been the convention that the Whip and the Leader was elected by the legislature party and not the political party cannot be taken into consideration, even though it is true in the State of Maharashtra that it was the convention, in view of the clear law laid by the Hon'ble Supreme Court in *Subash Desai (Supra)*.

149. As noted earlier, in view of the fact that in the present matter rival factions have emerged<sup>71</sup> and both the factions claimed to



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<sup>70</sup> Paragraph 119 of *Subash Desai*.

<sup>71</sup> Finding that rival factions have emerged is recorded in Paragraphs 119 of *Subash Desai*.

be the real political party, it necessitated determining 'which faction was the real political party' when the rival factions emerged. The said determination would aid in finding whether recognition of appointment sought for leader and/or the whip comes from the real political party. The said *preliminary determination* is also relevant in considering 'whether a whip, who stood appointed when rival factions emerged continued to be the 'Whip so authorised by the real political party, who reflected the will of the real political party'.

150. Having already found that the 'Shinde faction' were the 'real Shiv Sena Political Party' when the rival factions emerged on 21<sup>st</sup> June 2022' now I proceed to determine the controversy surrounding the appointment and removal of the Whip.

151. The Hon'ble Supreme Court, while discussing the legality of the recognition of 'Leader' and the 'Whip' of Shiv Sena accorded by the Letter dated 03<sup>rd</sup> July 2022, held that the Speaker ought to have taken into consideration the 'split' that took place within the Shiv Sena which were discernible from two sets of resolutions, appointing two different 'leaders' and 'whips', placed on record by the Shiv Sena before the Legislature Secretariat. Further, the Hon'ble Supreme Court held in Paragraph 124 of *Subash Desai* that the Speaker must recognize the Whip and the Leader who are duly authorized



by the Political party after conducting an enquiry in this regard and in keeping with the principles discussed in *Subash Desai (Supra)*<sup>72</sup>. This necessitates a revisit of the Order dated 03<sup>rd</sup> July 2022 which recognized the Shri. Eknath Shinde as the 'Leader' of the SSLP and Shri. Bharat Gogawale as the 'Whip'.

152. Shri. Sunil Prabhu came to be appointed as the 'Whip' of the Shiv Sena Political Party *vide* Resolution dated 31<sup>st</sup> October 2019. There is no dispute as to the fact that he continued to be the 'duly authorized whip' till 21<sup>st</sup> June 2022. However, since the rival factions emerged on 21<sup>st</sup> June 2022, it will have to be determined whether the appointment of Shri. Sunil Prabhu continued to reflect the 'will of the political party' once rival factions emerged. As stated earlier, the emergence of rival factions occurred the moment when the 'Shinde faction' passed the Resolution dated 21<sup>st</sup> June 2022, removing Shri. Sunil Prabhu as the Whip. But was the removal of Shri Sunil Prabhu done by the 'real Shiv Sena Political Party'? If it was, then from the very moment of passing of the resolution to remove him, Shri. Sunil Prabhu ceased to be the duly authorized whip.

153. I have already held that the 'Shinde faction' was the real political party when the rival factions emerged. Thus, it must be concluded that Shri. Sunil Prabhu ceased to be the duly



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<sup>72</sup> Paragraph 124, 167 & 168 of *Subash Desai*.

authorized whip and thus ceased to reflect the will of the real political party when the rival factions emerged.

154. The question as to whether the said resolution was passed by the Legislature Party and not the Political Party would also have to be considered. A submission made by the Petitioner has to be addressed. The Petitioner submitted that 'even if we are to take that Shri. Sunil Prabhu did not continue to reflect the 'will of the real political party', his removal was still invalid as it was done by the 'Shiv Sena Legislature Party' and not the 'Shiv Sena Political Party'. To buttress this, the Resolution dated 21<sup>st</sup> June 2022 passed by the Shinde faction was relied upon. According to the Petitioner, in view of principles laid down by the Hon'ble Supreme Court in *Subash Desai* in Paragraph 111 to 114, the 'appointment' has to be made by the 'Shiv Sena Political Party' and not the 'Shiv Sena Legislature Party'.

155. While this appears to be an attractive argument at first blush, I am unable to accept it. It is necessary to look into certain principles in respect of the 'role of the whip' laid down by the Hon'ble Supreme Court in *Subash Desai*. The Hon'ble Supreme Court has held that the Leader and the Whip, in respective roles, are the figurative umbilical cords between the legislators and the real political party.



156. Once it has been held that the Shinde Faction was the real political party, it is no longer possible to accept the proposition that a Whip appointed prior to the emergence of the faction previously would continue to hold the power especially when he did not belong to the real political party. It could be argued that his removal was by a resolution of the Legislative Party, and not by the political party. But this is easily answered when it is understood that the recognition of the Shinde faction as the real political party has resulted in severing the umbilical cord that connected Sunil Prabhu to the real political party. If this were not so, then the legislators would have no choice but to follow the direction of any Whip which might not reflect the will of the political party or might even be contrary to the intent or directives issued by the political party. Such a Whip could act with impunity against the will of the political party as well as its Legislature Party on the spurious assumption that his original appointment was validly made.

157. In view of my finding that the '*Shinde faction*' was the real political party, when the rival factions emerged and in view of the Resolution dated 23<sup>rd</sup> June 2023 passed by the '*Shinde faction*', I have come to the conclusion that, Shri. Eknath Shinde was validly appointed as the '*Leader*' by the Shiv Sena Political Party on 21<sup>st</sup> June 2023.



158. In view of my findings that the '*Shinde faction*' was the real political party when the rival factions emerged, and that Shri. Sunil Prabhu ceased to be the '*duly authorized whip*' from 21<sup>st</sup> June 2022, I further conclude that, Shri. Bharat Gogawale was validly appointed as the 'Whip' as that was the reflection of the will of the Shiv Sena Political Party as on 21<sup>st</sup> June 2023.

#### **VI. Final Conclusions and findings on the preliminary issue**

159. Following are the final conclusions from the analysis, observations, conclusions, findings, and rulings recorded from Paragraph 82 to Paragraph 158 hereinabove, I conclude as follows:

- (A) '*Shinde faction*' was the 'real Shiv Sena Political Party' when the rival factions emerged on 21<sup>st</sup> June 2022.
- (B) Shri. Sunil Prabhu ceased to be the '*duly authorized whip*' from 21<sup>st</sup> June 2022.
- (C) Shri. Bharat Gogawale was validly appointed as the 'Whip' by the Shiv Sena Political Party on 21<sup>st</sup> June 2022.
- (D) Shri. Eknath Shinde was validly appointed as the 'Leader' by the Shiv Sena Political Party on 21<sup>st</sup> June 2022.





***C. Have the Respondents incurred disqualification in terms of Paragraph 2 (1) (b) of the Tenth Schedule of the Constitution on account of their acts, omissions, and conduct?***

160. Petitioner has contended that the Respondents are liable to be disqualified on various grounds. Both the Petitioner's and Respondents' submissions are recorded in Section (II) hereinabove. However, the prayer for disqualification, in the present Petition, is restricted to the (alleged) violation of Whip dated 02<sup>nd</sup> July 2022 (allegedly) issued by the Petitioner in respect of the 'confidence motion held on 04<sup>th</sup> July 2022'. Other averments are all repetitions of submissions in Petitions No. 01-16, 18 & 19 of 2022. Thus, my findings thereof may be read and referred to in respect of other averments in the present petition which also forms part of those petitions.

161. Thus, the only ground on which the Petitioner sought disqualification of the Respondents is that the Respondents have violated the Whip dated 02<sup>nd</sup> July 2022 (allegedly) issued by the Petitioner in respect of the 'confidence motion' held on 04<sup>th</sup> July 2022. This submission cannot be accepted, and the Respondents cannot be held to be disqualified in view of my conclusion in respect of the 'real political party' that the 'Shinde faction' was the real political party when rival factions emerged and Shri. Sunil Prabhu ceased to reflect the 'will of the political party' from the moment rival factions emerged.



Thus, it would not be correct to say that Shri. Sunil Prabhu had any authority to issue any Whip on 02<sup>nd</sup> July 2022. Hence, on this ground alone, Petitioner's case that the Respondents are liable to be disqualified for violation of the Whip dated 02<sup>nd</sup> July 2022 must be rejected.

**162.** Irrespective of any conclusions that may be reached about 'which faction was the real political party' Respondents could not be held to be disqualified, on the ground that they violated the Whips dated 02<sup>nd</sup> July 2022. This is because of the reasons recorded hereinbelow:

- (a) The Petitioner has failed to prove the service of Whip dated 02<sup>nd</sup> July 2022. Petitioner Shri Sunil Prabhu (PW-1) in his *Affidavit in lieu of Examination in Chief* deposed that "the Whips dated 02<sup>nd</sup> July 2022 were sent by Email to the Email addresses of the Respondents". He stated that "Shri Vijay Joshi, an employee working in the Shiv Sena Vidhimandal Karyalaya, Vidhan Bhavan was instructed to send the Whips". He further deposed that "two whips dated 02<sup>nd</sup> July 2022 were sent by Shri Vijay Joshi to the Respondents in Disqualification Petition No. 19 and 21 of 2022 *vide* three emails dated 02<sup>nd</sup> July 2022". The said Emails were produced along with the *Affidavit in lieu of Examination in Chief*. He further stated that Email addresses of the Respondents were taken from the Email



addresses mentioned in the official list of members of Maharashtra Legislative Assembly 2023 or as mentioned in a list furnished by the Advocate for the Respondents *vide* an Email dated 21<sup>st</sup> September 2023.

Shri. Vijay Joshi (PW-2) specifically filed *Affidavit in lieu of Examination in Chief* and deposed that “he was working in the Shiv Sena Vidhi Mandal Karyalaya, Vidhan Bhavan in July 2022 and on instructions of Shri Sunil Prabhu sent two Whips dated 02<sup>nd</sup> July 2022 to the MLAs of the Shiv Sena Legislature Party *vide* three mails”. He produced print outs of emails dated 02<sup>nd</sup> July 2022 along with Whips dated 02<sup>nd</sup> July 2022. However, during the cross examination of Shri Vijay Joshi (PW-2), he deposed that “one computer operator printed the Whips dated 02<sup>nd</sup> July 2022 and he along with two peons distributed the Whips to all the legislators of Shiv Sena. Further he also deposed, during cross examinations that acknowledgements were taken.

Thus, the witness who was specifically brought to depose in respect of the service of Whips dated 02<sup>nd</sup> July 2022 made extremely contradictory statements in the *Affidavit in lieu of Examination in Chief* and during cross examinations. Further, it is to be also noted that the acknowledgments talked about by Shri Vijay Joshi (PW-



2) were never brought on record. Coupled with the above facts, Respondents have demonstrated how some of the email ids in the printout of the email produced by Shri Vijay Joshi are wrong. In view of the above, I hold that the Petitioner has not been able to establish the service of Whips dated 02<sup>nd</sup> July 2022 and thus Petitioner's case that the Respondents were liable to be disqualified for violation of the Whip dated 02<sup>nd</sup> July 2022 must be rejected.

- (b) Rule 3 (5) of the Members of Maharashtra Legislative Assembly (Disqualification on Grounds of Defection) Rules, 1986 provides that *"where a member belonging to any political party votes or abstains from voting in the Assembly, contrary to any directions issued by such political party or by any person or authority authorized by it in this behalf, without obtaining in either case, the prior permission of such political party, person or authority, the leader of the legislative party concerned.....shall as soon as maybe thereafter and in any case within thirty (30) days from the date of such voting or abstention inform the Speaker as in Form-II whether such voting or abstention has or has not been condoned by such political party, person or authority"*. From the records of the Legislature Secretariat, it is seen that the Petitioner and/or 'UBT faction' has not complied with this Rule. Thus, on this ground also Petitioner's



case that the Respondents were liable to be disqualified for violation of the Whips dated 02<sup>nd</sup> July 2022 must be rejected.

- (c) The Hon'ble Supreme Court in *Kihoto Hollohan Vs. Zachillhu & Ors*<sup>73</sup> at Paragraph 123 (SCC Page number) has held that *"keeping in view the consequences of the disqualification, i.e., termination of the membership of a House; it would be appropriate that the direction or Whip which results in such disqualification under Paragraph 2 (1) (b) is so worded as to clearly indicate that voting or abstaining from voting contrary to the said direction would result in incurring the disqualification under Paragraph 2 (1) (b) of the Tenth Schedule so that the member concerned has fore-knowledge of the consequences flowing from his conduct in voting or abstaining from voting contrary to such a direction"*. A perusal of the Whips dated 02<sup>nd</sup> July 2022 shows that the Whips dated 02<sup>nd</sup> July 2022 do not contain any words which would indicate that the said Whip, if not followed, would result in disqualification. Thus, on this count as well Petitioner's case that the Respondents are liable to be disqualified for violation of the Whips dated 02<sup>nd</sup> July 2022, issued by Shri Sunil Prabhu, must be rejected.



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<sup>73</sup> 1992 SCC Suppl. (2) 651

(d) Further, it must also be noted that, rightly or wrongly, Shri. Bharat Gogawale was the Whip who was recognized by this office on 03<sup>rd</sup> July 2023. Even though the Hon'ble Supreme Court was pleased to set aside the said recognition and direct this office to re-examine the recognition after an enquiry into whether the appointment of Shri. Gogawale reflected the 'will of the political party', as on 03<sup>rd</sup> July 2022 Shri Gogawale was the recognized Whip and the legislators who acted accordingly cannot be faulted for not following any other Whip issued by Shri. Sunil Prabhu. Hence, on this ground also Petitioner's case that the Respondents are liable to be disqualified for violation of the Whips dated 02<sup>nd</sup> July 2022, issued by Shri Sunil Prabhu must be rejected.

## VII. ORDER

163. In view of my conclusions and findings recorded hereinabove, Petition No. 21 of 2022 is hereby dismissed.



  
.....  
(Speaker)  
(Maharashtra Legislative Assembly)

Date: 10.01.2024

Place: Vidhan Bhavan, Mumbai